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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FISHERMEN'S FINEST INC; US FISHING LLC;
NORTH PACIFIC FISHING INC, PETITIONERS

v.

GARY LOCKE, AS HE IS THE SECRETARY OF THE
UNITED STATES DEPARTMENT OF COMMERCE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson Act") to regulate and control the fishing industry in order to restore fisheries depleted by overfishing. Congress determined that the federal government, rather than the free market, should allocate fish stocks to potential market participants. The Secretary of Commerce (the "Secretary") was to oversee such regulation through regional fishery management councils, and to assure that it met certain national standards adopted by Congress. The national standards were designed to, among other things, assure that allocations have an objective basis in science (allocations "shall be based upon the best scientific information available") and minimize the economic harm to all potential market participants (regulations shall be "fair and equitable to all . . . fishermen").

In 1998, Congress enacted the American Fisheries Act (the "AFA"), which by-passed the Magnuson Act council process and directly granted lucrative fishing rights to pollock in Alaska to specified market participants, creating a monopoly. Recognizing the potential for economic harm created by such a Congressionally-sponsored monopoly to other fishery participants in Alaska, Congress directed the Secretary in approving regulations under the Magnuson Act to "protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by th[e AFA] or fishery cooperatives in the directed pollock fishery." Among the fisheries to be protected was the Alaska cod fishery.

In 2007, the North Pacific Fishery Management Council (the "Council") developed Amendment 85 to the Fishery Management Plan ("FMP") for Groundfish of the Bering Sea and Aleutian Islands Management Area ("BSAI"), a regulation that reallocated catch in the cod fishery in a way that harmed cod fishermen who were excluded from the pollock monopoly – in violation of the explicit directives of the AFA and the Magnuson Act. In 2007, the Secretary approved and promulgated that regulation.

The questions presented are:

1. Whether the Ninth Circuit erred by failing to require the Secretary and Council to fulfill their statutory duty under the AFA to protect those fishermen excluded from the pollock monopoly from the economic harm created by the AFA?

2. Whether the Ninth Circuit erred in creating a threshold of "harm" that must be reached before the protective measures required by statute to protect against the impact of the government-created monopoly in the AFA are taken by the Council and Secretary?

RULE 29.6

Petitioners are privately held companies. No publicly held corporations own more than 10% of Petitioners' stock.

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JURISDICTION

The Ninth Circuit issued its opinion on January 19, 2010; denied a timely petition for rehearing on March 29, 2010; and entered judgment in the case on April 26, 2010. Justice Kennedy extended the time to file this petition until August 11, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set out herein and/or reproduced in the appendix to this petition: AFA, Pub. L. No. 105-277, Div. C, Title II, Subtitle I, §§ 205, 207-09, 211 and 213, 112 Stat. 2681-621 to 2861-637 (Oct. 21, 1998), codified at 16 U.S.C. § 1851 note; Magnuson Act, 16 U.S.C. §§ 1851, 1852(h), 1853, 1853a, and 1854(a); and Amendment 85, 72 Fed. Reg. 50,788 (Sept. 4, 2007).

STATEMENT OF CASE

This appeal involves the government's disregard of an explicit Congressional directive to protect fisherman from the economic harm created by a government-imposed monopoly in one of the nation's most lucrative fisheries – the pollock fishery conducted

in federal waters off the coast of Alaska. In the AFA, Congress created an exclusive directed pollock fishery for a select few fishermen, but explicitly charged the Council and Secretary with protecting fishermen excluded from the pollock monopoly from any additional economic harm due to adverse effects of the monopoly.

Instead of fulfilling this statutory duty, the Council and Secretary promulgated Amendment 85, which grants the already-favored AFA fishermen new fishing privileges in the Pacific cod fishery at the expense of non-AFA fishermen who are long time participants in the cod fishery. So little cod was allocated to the non-AFA catcher processor ("CP") sector that the sector was forced to choose between largely abandoning its traditional directed cod fishery or preserving its ability to conduct lawfully the rest of its other groundfish directed fisheries, where cod is caught as incidental catch.

The district court upheld Amendment 85. The Ninth Circuit acknowledged that the "interests of [Petitioners] were sacrificed," but ignored the AFA's protective mandate. Instead, legislating from the bench, the Ninth Circuit affirmed the lower court's decision and applied rules of its own making that modified the balance struck by Congress in the AFA, and broadened the adverse economic impacts of the pollock monopoly.

As Judge Clifton noted in dissent, Amendment 85:

> inflicts on the non-AFA trawl CP sector an unmitigated loss of the Pacific cod market share .

> . . that sector cultivated in the years following its exclusion by the AFA from the pollock fishery. . . . A[mendment] 85's redistribution of the Pacific cod TAC imposes on the non-AFA trawl CP [sector] an adverse impact that [the AFA] requires the Council to guard against.

Pet.App.30a.

If not reversed, the Ninth Circuit's opinion will render meaningless the only protection in the AFA for fishermen, such as Petitioners, who were severely disadvantaged by the AFA monopoly. It will allow the beneficiaries of the lucrative pollock monopoly to continue to expand into other fisheries – fisheries on which fishermen disadvantaged by the AFA entirely depend.

This is the opposite of what Congress intended in enacting the AFA, and undermines American public policy disfavoring monopolies and the anti-competitive advantages that they bestow. Contrary to relevant decisions of this Court, the Ninth Circuit's interpretation of the AFA fails to "recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411-12 (2004) (internal quotations, brackets and citations omitted). The Council, Secretary, and Ninth Circuit ignored the direct adverse economic effects inflicted by the AFA pollock monopoly, as well as the cumulative negative effects of additional fisheries regulations, on the non-AFA trawl CP sector. The Ninth Circuit opinion conflicts with

fundamental policies recognized by this court in favor of competition and against monopoly power.

The Ninth Circuit's decision also has implications for federally regulated fisheries outside of Alaska. Other fishery "catch share" programs that will allocate a specific percentage of catch or a specific fishing area to individuals, cooperatives, or other entities are in development across the United States. The creation of these new exclusive fishing privileges stems from the 2006 amendments to the Magnuson Act. *See* Pub. L. 109-479, 120 Stat. 3575. Should fishery management councils and the Secretary fail to enforce the protective mandates that Congress requires in such programs, then disfavored fishermen well beyond Alaska could be severely harmed by the development of a body of federal law that fails to implement well-developed restrictions placed by this Court on the reach of anti-competitive activities. Review by this Court is warranted.

Background

The federal groundfish fisheries in the BSAI are the largest fisheries in the United States. Pollock is the largest and most lucrative fishery in the BSAI fishery, followed by Pacific cod. Pet.App.2a.

In the 1990s, too many boats were fishing for too few fish in the BSAI fishery. In 1998, in an effort to end this "race for fish," Congress:

1) granted an exclusive monopoly over the most lucrative offshore fishery in the BSAI to 20 large trawl vessels (the "AFA vessels");

2) bought out nine large trawl vessels;

3) created "sideboards" which capped the potential catch of non-pollock species such as cod for AFA vessels and processors (in order to protect non-AFA vessels and processors in other fisheries from "spillover effects" of excess harvesting and processing capacity created by the formation of cooperatives under the AFA); and

4) excluded other traditional market participants, such as Petitioners, from directed fishing for pollock.

See 16 U.S.C. § 1851, note, AFA §§ 205-213.

Recognizing the harm potentially created by a government-imposed monopoly in the pollock fishery, Congress required the entities charged with implementing the AFA[1] to protect fishing vessels not favored by the AFA monopoly (the "non-AFA vessels") in allocating resources in the non-pollock fisheries. 16 U.S.C. § 1851, note, AFA § 211(a) ("The . . . Council shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries,

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[1] The Council and the Secretary implement the AFA. The Council, comprised of 11 voting members (seven of whom are appointed by the Secretary upon the recommendation of the governors of Alaska and Washington) and four non-voting members, makes recommendations to the Secretary. North Pacific Fishery Management Council, Membership & Information, http://www.fakr.noaa.gov/npfmc/membership/council/council_membership.htm (last visited July 29, 2010).

including processors, from adverse impacts caused by th[e AFA] or fishery cooperatives in the directed pollock fishery.").

As with most monopolies, the consequences of the AFA have been dramatic. Predictably, the AFA vessels have prospered. The non-AFA vessels have not.

Because non-AFA vessels were pushed out of the pollock fishery, they rely heavily on Pacific cod for both directed and incidental catch. Petitioners, part of the non-AFA trawl CP sector, depend completely on their cod allocation in order to conduct their entire business because cod is ubiquitous, valuable, and difficult to avoid even when other species are being targeted.

In 2007, the Secretary approved and promulgated Amendment 85, as developed by the Council, which regulates and allocates the catch in the Pacific cod fishery. Amendment 85 substantially reduced the non-AFA trawl CP sector's Pacific cod allocation to 13.4% of the total allowable catch ("TAC"). This reflected a reduction from the sector's historical catch in 2004 and 2005 (17.7%)[2] by over four percentage

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[2] Allocations are based on historical catch data, and allocations in limited access privilege and other catch share programs must always reflect the Council's or Secretary's consideration of, *inter alia*, "current and historical harvests." 16 U.S.C. § 1853a(c)(5)(A)(i). Amendments must also be consistent with ten "National Standards" under the Magnuson Act. *Id.* § 1853(a)(1)(A), -(a)(1)(C); 50 C.F.R. §§ 600.305-600.355. Those standards include National Standard 2, which requires councils to base management measures "upon the best scientific information

points.[3] In contrast, for the first time since the AFA was enacted, the AFA trawl CP sector (the vessels that benefit from the pollock monopoly) were granted an exclusive cod allocation in a far larger amount than the sector's average post-AFA catch.[4]

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available." 16 U.S.C. §§ 1851(a)(2), 1853(a)(1); 50 C.F.R. § 600.315(a). An allocation must also be "fair and equitable to all . . . fishermen" and "carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. § 1851(a)(4)(A), -(a)(4)(C); 50 C.F.R. § 600.325(a).

These principles, along with the protective measures in AFA § 211(a), were ignored and misapplied below. As Judge Clifton correctly concluded in his dissent, "[r]elying on pre-AFA data to calculate the catch history of post-AFA players, without making any effort to adjust for the impact of the AFA, is manifestly unreasonable." Pet.App.32a. However, the Ninth Circuit deferred to the Council's and Secretary's reliance on outdated, irrelevant catch data to set future cod allocations, a decision that has implications for future courts scrutinizing the application of the Magnuson Act's National Standards to fishery allocations created as part of new catch share programs.

[3] These allocations have a significant financial impact, as each percent of the TAC allocated represents a minimum of $2 million in annual revenue. Pet.App.11a. Under a conservative estimate (calculating each share at $2 million), the loss of 2.6% of the total fishery results in an annual loss of $5.2 million to the non-AFA trawl CP sector; the loss of 4.3%, $8.6 million. *See* Letter from Fishermen's Finest to S. Madsen, North Pacific Fishery Management Council, Re: Amendment 85 to the BSAI Groundfish FMP Agenda Item C-3 (Apr. 6, 2006).

[4] *See* Pet.App.29a ("In post-AFA years, between 1998 and 2003, the AFA sector's average harvest of Pacific cost was just 1.5%, substantially lower than A[mendment] 85's allocation of 2.3%.").

Amendment 85 harmed Petitioners and the non-AFA fleet by granting the privileged AFA sector a cod allocation substantial enough to support both a directed cod fishery and incidental catch needs in its pollock fishery, at the expense of millions of dollars of annual revenue to non-AFA vessels. In the post-AFA era, any cod allocation below 16% to the non-AFA trawl CP sector does not reflect the sector's actual and continuing dependency on cod.[5] The reduced allocation in Amendment 85 destroyed the way that Petitioners have fished since the beginning of the domestic cod fishery in the North Pacific in the 1980s. The reduction forced them to abandon their long-time directed cod fishery in order to preserve their ability to pursue their other groundfish fisheries in which cod is caught and retained as valuable incidental catch.

Because Amendment 85 increased the AFA catch and reduced the non-AFA catch to the substantial harm of non-AFA vessels, the Secretary should have disapproved Amendment 85. Instead, with Amendment 85, the Council and Secretary abdicated their statutory responsibilities under the Magnuson Act and section 211 of the AFA to protect non-AFA vessels. Petitioners therefore sought redress from the courts, and challenged Amendment 85 under the AFA, the Magnuson Act, and the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06.

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[5] *Id.* ("During those years [1998-2003] the non-AFA trawl CP sector harvested 15.7% of TAC, yet A[mendment] 85 allocates only 13.4% to that group.").

Proceedings Below

The district court, exercising jurisdiction under 5 U.S.C. §§ 551-59, 701-06, erroneously concluded that the legality of Amendment 85 turned upon factual findings by the Secretary that balanced competing factors set forth in the Magnuson Act, and deferred to the agency's expertise. It failed to realize that section 213(b) of the AFA specifically provides that, "[e]xcept for the measures required by this subtitle, nothing in this subtitle shall be construed to limit the authority of the . . . Council or the Secretary under the Magnuson . . . Act." AFA § 213(b). The Secretary's failure to comply with the AFA was therefore inadequate as a matter of law and contrary to the unambiguous requirements of the AFA. Yet the district court incorrectly treated that and other legal errors as factual determinations entitled to deference. *See* Pet.App.33a-50a.

The Ninth Circuit, exercising jurisdiction under 28 U.S.C. §§ 1291 and 1294(1), affirmed the district court. In doing so, it ignored principal mandates of the AFA and the strong public policy disfavoring monopolies. To avoid the clear Congressional directive for the Secretary and Council to protect against economic harm in the cod fishery as a result of the monopolies awarded in the pollock fishery, the Ninth Circuit created a new threshold for "harm" that does not appear in the AFA and is inconsistent with Congressional intent. Then, by misinterpreting a key term in fisheries law, the Ninth Circuit erroneously concluded that the AFA sector was somehow harmed by receiving an increase in its cod allocation, and the non-AFA trawl CP sector was not harmed by the decrease in its allocation.

Judge Clifton dissented. He explained that the AFA requires the Council and Secretary to protect non-AFA fisheries from "'adverse impacts caused by th[e AFA] or fishery cooperatives in the directed pollock fishery.'" Pet.App.27a (quoting 16 U.S.C. § 1851, note, AFA § 211(a)). He concluded that:

> [i]n A[mendment] 85, the Secretary and the Council abdicated their responsibility to protect non-AFA vessels by granting the already privileged AFA trawl CP sector, for the first time, a direct allocation of the . . . TAC . . . of Pacific cod. That allocation was made at the expense of, among others, the non-AFA trawl CP sector, which of necessity relies more heavily on Pacific cod after being pushed out of the pollock fishery by the AFA.

Pet.App.27a-28a.

The harm suffered by the non-AFA vessels continues today. Similarly, the fishery management plan for the BSAI fishery will continue to be amended by the Council and the Secretary pursuant to the Magnuson Act in response to changing conditions in those fisheries. *See* 16 U.S.C. § 1852(h)(1)(B). If not reversed, the Ninth Circuit's holding will allow the Council and the Secretary to continue to disregard Congress' carefully circumscribed limits on the monopoly that it created through the AFA, and other fishery councils around the country are likely to follow suit.

REASONS FOR ALLOWING THE WRIT

I. The Ninth Circuit decided an important question of federal law in a way contrary to both this Court's and Congress' view of regulated monopolies; the federal question has not been, but should be, settled by this Court.

This petition raises an important question of federal law that broadly impacts fisheries across the nation. Specifically, the question involves the statutory interpretation of the protections against economic harm written into legislation that otherwise vests monopoly power in a select few fishing vessels. Contrary to Congress' explicit instruction and this Court's prior holdings, the Ninth Circuit interpreted the AFA broadly, affirming a regulatory scheme that worsens the very economic harm from the pollock monopoly that the Council and Secretary are supposed to prevent. In not strictly interpreting the AFA to limit the impact of monopoly power, the Ninth Circuit committed errors that should be reviewed by this Court.

"The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. 231, 248 (1951). In setting such policy in enacting "the Sherman and Clayton Acts, . . . 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" *Id.* at 248-49 (quoting *A.E. Staley Mfg. Co. v. Fed. Trade Comm'n*, 135 F.2d 453, 455 (7th Cir. 1943)); *see also Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) ("antitrust laws represent

a fundamental national economic policy" (internal citations and quotations omitted)); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (explaining that antitrust legislation "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive [*sic*] to the preservation of our democratic political and social institutions").

The AFA monopoly is a Congressionally-created exception to the general policy disfavoring monopoly, but the exception was created with a substantial caveat representing Congress' continuing commitment to a national policy favoring competition and disfavoring monopoly power. The Secretary and Council in implementing the AFA were charged with protecting fishermen harmed by the pollock monopoly. In light of the national policy recognized by this Court, the protective obligations of the Secretary and Council should be strictly enforced. In other words, the Court should require compliance with a regulatory structure designed to deter and compensate for the inherent unfairness of a monopoly. *See, e.g., Verizon Comme'ns Inc.*, 540 U.S. at 412 ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm." (internal quotations, brackets and citations omitted)).

The Ninth Circuit's opinion upholding Amendment 85: (1) ignores the policy balance struck by Congress in the AFA, leaving these fishermen unprotected in ongoing regulatory actions; and (2) excuses the Secretary and the Council from their

continuing statutory obligations to evaluate and mitigate the adverse impacts of this monopoly on those excluded from it.

According to its legislative history, section 211(a) of the AFA reflects "Congress['] inten[t] for the . . . Council to consider particularly any potential adverse effects on fishermen in other fisheries resulting from increased competition in those fisheries from vessels eligible to fish in the BSAI directed pollock fishery or in fisheries resulting from any decreased competition among processors." Pet.App.248a. The AFA also:

> attempts to ensure adequate protections for other fisheries in the North Pacific and Pacific from any potential adverse impacts resulting from the formation of fishery cooperatives in the pollock fishery. The formation of fishery cooperatives will undoubtedly free up harvesting and processing capacity that can be used in new or expanded ways in other fisheries. Although many of these vessels and processors have legitimate, historic participation in these other fisheries, they should not be empowered by this legislation to gain a competitive advantage in these other fisheries to the detriment of participants who have not benefitted from the resolution of the pollock fishery problems.

Pet.App.242a.

The AFA thus explicitly requires the Council and the Secretary to modify management measures developed under the Magnuson Act so that: (1) participants in the non-AFA BSAI fisheries are

protected from adverse impacts caused by the AFA and AFA cooperatives; and (2) AFA vessels are not inordinately advantaged by the monopoly that they received. AFA §§ 211(a), 213.

Anticipating the ripple effects from the pollock monopoly, Congress tasked the Council with extra vigilance in BSAI groundfish management measures. Senator Murray explained:

> While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true.[6]

The Ninth Circuit conceded that the AFA created a monopoly, the adverse effects of which the Council and Secretary must prevent. Pet.App.5a-6a. Yet it failed to adhere to Congress' carefully circumscribed limitations on that monopoly – limitations imposed in respect of well-settled rules repeatedly applied by this Court in its antitrust and related jurisprudence.

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[6] Pet.App.242a; *see also Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 761 & n.4 (9th Cir. 2009) (quoting same and explaining that "the AFA created bilateral monopolies . . . under the AFA[,]" and "Congress recognized that this cooperative scheme could have adverse economic effects on other fisheries and non-participating processors.").

At best, the Ninth Circuit's opinion re-writes the AFA. At worst, it reads the protective requirements out of the AFA. Non-AFA fishermen have no private right of action under the AFA allowing them to seek redress for adverse impacts due to the pollock monopoly, and instead must rely on the Secretary for consistent and fair application of section 211(a).

This Court has explained that "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (citations omitted); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (same). The Ninth Circuit failed to heed this directive in upholding Amendment 85.

The issues raised in this case are important to fishermen nationwide. Their importance is magnified as fishery closures continue around the coasts, decreasing the amount of fish that can be caught; as national fishery management steadily moves away from open access fisheries and toward catch shares; and as the number of programs granting exclusive fishing privileges to select groups increases.[7] Fisheries management policy continues to narrow access to public fisheries resources. The methods by which the Council, the Secretary, and the courts select and manage those

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[7] *See* Pet.App.256a-301a (recommending use of allocations of specific percentages of TAC for certain fishing areas to individuals, cooperatives, communities, and other entities); 16 U.S.C. § 1853(a) (limited entry provisions in Magnuson Act amendments).

allowed to make a living from those resources must be fair.

The Secretary will continue allocating exclusive fishing privileges to discrete groups of fishermen across the country. *See* 16 U.S.C. § 1852(h)(1)(B). In its 2006 amendments to the Magnuson Act, Congress encouraged further development of limited access privilege programs ("LAPPs") that would issue federal permits governing who could harvest fish. Pub. L. 109-479, § 303A, codified at 16 U.S.C. § 1853a. In late 2009, the Obama Administration embraced this directive and issued a controversial draft policy promoting the expanded use of forms of LAPPs and other catch share programs.[8] Because these programs inevitably create clear winners and losers, lawsuits over the allocations they create have already been filed.[9] More will likely follow.

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[8] The policy "encourages the consideration and adoption of catch shares wherever appropriate in fishery management and ecosystem plans . . . ." Pet.App.259a. Fishery management councils have aggressively followed this directive nationwide. *See, e.g.*, 75 Fed. Reg. 32,994 (June 10, 2010) (proposing measures to implement Amendment 20 to the Pacific Coast Groundfish Fishery Management Plan in catch share program); 74 Fed. Reg. 42,580 (Aug. 24, 2009); 74 Fed. Reg. 44,732 (Aug. 31, 2009) (establishing limited access catch share programs in the Mid-Atlantic Tilefish Fishery and Gulf of Mexico Reef Fish Fishery, respectively); 75 Fed. Reg. 18,262 (Apr. 9, 2010) (establishing catch share program for Atlantic groundfish).

[9] For example, the cities of New Bedford and Gloucester and a coalition of New England and mid-Atlantic fishermen recently filed a suit challenging Amendment 16, which establishes a catch share program for Atlantic groundfish. *See City of New Bedford et al. v. Locke*, No. 10-10789 (D. Mass. May 9, 2010).

In creating new catch share programs, the councils and the Secretary are required to be mindful of the anti-competitive implications of their actions. The 2006 Magnuson Act amendments provide that any LAPP "to harvest fish submitted by a Council or approved by the Secretary" shall, among other requirements:

> (J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and
>
> (K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

16 U.S.C. § 1853a(c)(1). Further, in allocating fishing privileges, the councils and the Secretary are to "ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by . . . establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges." *Id.* § 1853a(c)(5)(d).

Yet, as Amendment 85 illustrates, these requirements are in danger of being minimized or ignored by the Secretary. Review by this Court is

necessary to secure and maintain uniformity in an area of challenging and complex regulatory change. The regulated community must be consistently treated fairly – particularly when being granted or denied access to public resources.

Outside of this case, the AFA has been mentioned or analyzed by just three courts in five reported opinions since its enactment.[10] This Court has never addressed the statute and, aside from the lower courts in this case, no court has addressed the specific AFA provisions at issue here (sections 211 and 213). This case presents an important opportunity to properly interpret the AFA in light of Congress' and this Court's recognition of a national policy in favor of competition and against monopoly power.

II. The Ninth Circuit's creation of a rule contrary to its own holdings, the AFA, and basic canons of statutory construction warrants this Court's review.

The Ninth Circuit conceded that "[t]he AFA requires that the Council shall manage the BSAI . . . in a way to protect non-AFA vessels from adverse impacts of the directed pollock monopoly." Pet.App.24a. But rather than strictly apply the AFA requirement, the Ninth Circuit created an undefined threshold of harm that it claims must be reached before

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[10] *Sea Hawk Seafoods*, 568 F.3d 757; *Coghlan v. Amer. Seafoods Co. LLC*, 413 F.3d 1090 (9th Cir. 2005); *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360 (Fed. Cl. 2004); *Myers v. Amer. Triumph F/V*, 260 F.3d 1067 (9th Cir. 2001); *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050 (W.D. Wash. 2008).

the AFA requirement applies. Presented here is the issue whether the plain language in section 211(a) imposes a broad responsibility upon the Council and the Secretary to take continuing steps to protect those excluded from the pollock monopoly from *any* adverse impacts from the monopoly, or whether no such actions are needed unless some subjective minimum threshold of harm is exceeded.

The Ninth Circuit created a threshold of harm where no such statutory threshold exists – contrary to the language of the statute, and contrary to fundamental rules of statutory construction requiring that statutes be interpreted according to their plain language. *See Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156 (2010) (courts cannot add a "term of art" to a statute where "it is conspicuously absent," and doing so "more closely resembles inventing a statute rather than interpreting one" (internal citation and quotations omitted)); *Bates v. United States*, 522 U.S. 23, 29 (1997) (courts are to "resist reading words or elements into a statute that do not appear on its face"); *Badaracco v. C.I.R.*, 464 U.S. 386, 397 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." (citation omitted)); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1111 (9th Cir. 2001) (statutory construction principles require that a court "may not add anything to the statute that is not already there" (quotation omitted)).

The Ninth Circuit reasoned that "Fishermen's argument that they were injured in violation of [section] 211(a) ignores the fact that [section] 211(a) as defined in the AFA permitted greater [adverse] impact

by the AFA sector on the non-AFA sector than A[mendment] 85 effectuates." Pet.App.25a. There is no such concept or definition of "permitted impact" anywhere in the AFA.

If allowed to stand, the Ninth Circuit's decision would nullify section 211(a)'s broad regulatory mandate and destroy the balance of protections created by Congress. This is contrary to precedent across the Circuit Courts of Appeal, including the Ninth. *See, e.g., Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007) (a court's "inquiry is complete" when Congressional intent is clear and unambiguous, and courts "owe no deference to the agency's interpretation and must give effect to the statute as Congress intended it" (citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984))); *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (Reviewing courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965))); *Saipan Stevedore Co. Inc. v. Dir., Office of Workers' Comp. Pgms.*, 133 F.3d 717, 722 (9th Cir. 1998) ("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent. Indeed, if the intent of Congress is clear, that is the end of the matter." (citation and quotation omitted)); *Bell Atlantic Telephone Cos. v. F.C.C.*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (If the "search for the plain meaning of the statute . . . yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate." (citation omitted));

Jewish Hosp., Inc. v. Sec'y of Health and Human Servs., 19 F.3d 270, 274 (6th Cir. 1994) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." (quoting *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984))); *United States v. Mosaic Tile Co., Inc. v. N.L.R.B.*, 935 F.2d 1249, 1255 (11th Cir. 1991) ("If Congress has spoken to the issue with which we are concerned, there is no need for deference.").

The Ninth Circuit's decision – particularly, its construction of the AFA to include a "legally permitted adverse impact" – was based in part on a misunderstanding of the operation of the "sideboard limits" created in section 211(b). As Judge Clifton explained in dissent:

> [B]y any reasonable measure the new allocations adversely impact the non-AFA trawl CP sector at the same time that they benefit the sector already favored with the pollock monopoly granted under the AFA.
>
> The majority opinion seeks to rebut this assessment of A[mendment] 85's adverse impact on the non-AFA trawl CP sector by comparing the 6.1% "sideboard" limit formerly imposed on the AFA trawl CP sector's Pacific cod harvest to the smaller allocation made by A[mendment] 85 to the AFA sector. That misinterprets the function of the sideboard limit, which imposed a hard cap on the AFA trawl CP sector's harvest rather than granting it a direct allocation like the

> one the sector now enjoys under A[mendment] 85 . . . .
>
> [T]he AFA sector never came close to harvesting 6.1% of the Pacific cod TAC. . . . [E]ven using the range of years the Council relied on to calculate "catch history" as the basis for comparison, A[mendment] 85 assigned the AFA sector a share of the Pacific cod fishery above historic levels while curtailing the non-AFA sector's Pacific cod fishing rights below its historic share.

Pet.App.28a-29a (internal citations omitted).

The Ninth Circuit's reasoning that since the AFA sector's 2.3% cod allocation under Amendment 85 was less than the 6.1% cod sideboard permitted by section 211(b), no harm resulted to non-AFA vessels and no actions by the Council or Secretary were required, is wrong. Amendment 85 protected the AFA sector's directed cod fishery and incidental catch needs while sacrificing Petitioners' directed cod fishery.

The Ninth Circuit's formulation of this issue narrowed the reach of section 211(a) in a manner never intended by Congress. According to the Ninth Circuit, "[t]he question is not whether the A[mendment] 85 limits on AFA vessels are less restrictive than historical usage, but whether they are greater than the impact legally allowed by the AFA. They are not." Pet.App.25a. This misstatement of the issue and governing law re-writes the AFA and should be reviewed by this Court.

CONCLUSION

The Ninth Circuit's interpretation of the AFA is contrary to (1) Congress' directive to protect against the economic harm from the government-created monopoly of the pollock fishery, (2) Congress' and this Court's recognition of a national policy that requires exemptions creating monopoly power to be narrowly construed and applied, and (3) this Court's and other Circuits' rules of statutory interpretation that prohibit courts from varying the terms of a clear statute. In addition to the conflicts with Congress' directives and this Court's and other Circuits' holdings, the petition raises an important issue of federal law with national implications that should be addressed by this Court. The petition for certiorari should be granted, and the case should be heard on the merits or summarily reversed.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 08-36024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FISHERMEN'S FINEST INC; US FISHING LLC; NORTH PACIFIC FISHING INC, Plaintiffs-Appellants,

v.

GARY LOCKE, * as he is the Secretary of the United States Department of Commerce, Defendant-Appellee.

November 6, 2009, Argued and Submitted, Seattle, Washington
January 19, 2010, Filed

Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:07-cv-01574-MJP. Marsha J. Pechman, District Judge, Presiding.

COUNSEL: Linda R. Larson, and Jessica K. Ferrell, Marten Law Group PLLC, Seattle, WA, for the plaintiffs-appellants.

Charles R. Scott, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendant-appellee.

Before: Arthur L. Alarcon, Andrew J. Kleinfeld and Richard R. Clifton, Circuit Judges. Opinion by Judge Alarcon; Dissent by Judge Clifton.

OPINION

ALARCON, Senior Circuit Judge:

Fishermen's Finest, Inc., North Pacific Fishing, Inc., and U.S. Fishing, LLC, ("Fishermen's") appeal from the district court's order granting summary judgment in favor of the Secretary of the United States Department of Commerce. Fishermen's challenges the Secretary's issuance of a final rule adopting Amendment 85 ("A85") to the Fishery Management Plan ("FMP") for Groundfish of the Bering Sea and Aleutian Islands Management Area ("BSAIMA").

The Government allocates Pacific cod in the BSAIMA among different sectors of the fishing industry. Fishermen's belongs to the trawl Catcher / Processor ("CP") sector. It contends that the most recent allocation, which reduced its share of the Pacific cod fishery, did not comport with applicable law.

We affirm because we agree with the district court that the Secretary did not act arbitrarily and capriciously in adopting Amendment A85.

I

Fishermen's operates two medium-sized vessels that fish for Pacific cod, flatfish, rockfish and Atka mackerel in the BSAIMA. The BSAIMA fishery is located off the northwest coast of Alaska. It is this nation's largest in terms of harvest and area. Pollock is the most lucrative and largest fishery in the BSAIMA; Pacific cod is second. Different means of fishing are employed in the BSAIMA. Allocations are made among different

methods of fishing, because of their individualized environmental and socioeconomic impact. A trawler is a fishing vessel that fishes by dragging a large net or trawl through the water. CP vessels process fish by removing the head and gut as soon as they are caught, hence Fishermen's belongs to a sector colloquially known as the "Head & Gut" sector.

A

To understand the substance of Fishermen's claims requires an overview of the Government's regulation of fishing. Finding that "[c]ertain stocks of fish have declined to the point where their survival is threatened," 16 U.S.C. § 1801(a)(2)(A), Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") in 1976 to "conserve and manage fishery resources" and to "achieve and maintain, on a continuing basis, the optimum yield from each fishery." *Id.* § 1801(b)(1) & (4). In order to achieve these ends the MSA established eight regional Fishery Management Councils ("Councils"), which could set the Total Allowable Catch ("TAC") for each fish species in different fishing zones. *See id.* §§ 1852(b) & (c), 1801(b)(5); 1852(h)(1). The FMP's, and amendments thereto, do not become effective, however, until they are approved by the Secretary. See 16 U.S.C. §§ 1854(a)-(b), 1855. The Secretary has delegated this responsibility to the National Marine Fisheries Service ("NMFS"), which only promulgates the regulation after ensuring the FMP's and amendments are consistent with the MSA's ten National Standards, *inter alia*, 16 U.S.C. § 1854(a)-(b), and after a period of public comment. *Id.* §§ 1854(a)(1)(B) & (b)(1)(A).

Fishermen's complains that the most recent allocations of the Pacific cod TAC in amendment A85 to the current FMP of the BSAIMA violated National Standard 2 and National Standard 4 of the MSA. National Standards 2 and 4 provide that:

> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> . . .
>
> (4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a)(2) & (4). The MSA requires the NMFS to promulgate guidelines interpreting the National Standards. *Id.* at § 1851(b). According to the guidelines, National Standard 2 "best scientific information" "includes, but is not limited to, information of a biological, ecological, economic, or social nature." 50 C.F.R. § 600.315(b)(1) (2006). Further, FMPs and amendments must "take into account" the "best scientific information available at the time of preparation" and if new information becomes available between initial drafting and NMFS review, it "should be incorporated into the final FMP where practicable." *Id.* § 600.315(b). Where there are conflicting facts and

opinions, the Fishery Management Councils may choose what to consider "but should justify the choice." *Id.* § 600.315(b)(1).

With regards to National Standard 4, allocations are "fair and equitable" if they are "rationally connected to the achievement of [optimum yield] or with the furtherance of a legitimate FMP objective." *Id.* § 600.325(c)(3)(i)(A). Further, "[i]nherent in an allocation is the advantaging of one group to the detriment of another." *Id.* Thus, "[a]n allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." *Id.* § 600.325(c)(3)(i)(B). For example, section 305 of the MSA sets aside a portion of TAC for eligible villages as part of the Western Alaska Community Development Quota Program. *See* 16 U.S.C. § 1855(i)(1)(A).

Fishermen's also argues that A85's TAC allocation violates 211(a) of the American Fisheries Act ("AFA") by creating an "adverse impact" on non-AFA fishing vessels. In 1998, the AFA created a monopoly in fishing rights to pollock assigned to specific vessels that met a past participation test in that industry. AFA § 208. Fishermen's does not belong to this group. It is referred to as a non-AFA participant in BSAIMA fishing. The vessels granted a monopoly by the AFA operate as cooperatives that also engage in fishing for other species, as was anticipated and approved of by the AFA. Because of the competitive advantage the specific AFA vessels gained due to their pollock monopoly, Congress sought to limit their impact on other fisheries by dictating that Councils:

> shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from *adverse impacts* caused by this Act or fishery cooperatives in the directed pollock fishery.

AFA § 211(a) (emphasis added). Congress also built in protections in the AFA against unfair competitive advantages for the AFA vessels by imposing "sideboards," which are limits on how much fish of other species AFA vessels are allowed to catch. AFA § 211(b)(2) & (C). For example, in the Pacific cod fishery, AFA trawl CP vessels operated under a sideboard limit of 6.1% of TAC and AFA trawl CV vessels operated under a sideboard limit of 20.2% of TAC. As a result of the AFA, non-AFA vessels increased their harvest of non-pollock species, as they were now excluded from pollock. A80 Final Rule, 72 Fed. Reg. at 52, 668.

B

An FMP for the BSAIMA was first promulgated in 1981. 46 Fed. Reg. 63, 295 (Dec. 31, 1981). It includes annual TACs for each of seventeen target species, including Pacific cod. In 1994, for the first time, Amendment 24 allocated the Pacific cod TAC, 44% to the "fixed gear" (hook-and-line and pot) sector, 54% to the trawl sector, and 2% to the jig gear sector (fishing lure methods). 59 Fed. Reg. 4009, 4010 (Jan. 28, 1994). These allocations reflected the harvests in those sectors from 1991 to 1993, with the exception that the jig gear's allocations was increased to encourage growth. Amendment 24 also gave the NMFS authority to

"reallocate Pacific cod from vessels [from one sector to another] anytime . . . the [NMFS] determines that one gear group or the other will not be able to harvest its allocation of Pacific cod." 59 Fed. Reg. at 4010.

In 1997, Amendment 46 divided the trawl allocation between catcher vessels ("CV") and catcher-processors ("CP") and allocated 51% to fixed gear, 47% to trawl gear (divided equally), and 2% for jig gear. 61 Fed. Reg. 59029 (Nov. 20, 1996)(codified at 50 C.F.R. pt. 679). Amendments 64 and 77, passed in 2000 and 2003, respectively, further refined sector subdivisions from the original fixed gear sector into five groups. See 65 Fed. Reg. 51553 (Aug. 24, 2000)(codified at 50 C.F.R. pt. 679); 68 Fed. Reg. 49416 (Aug. 18, 2003)(codified at 50 C.F.R. pt. 679). These amendments did not alter the TAC allocated to the trawl CP group. *See* 72 Fed. Reg. 5654, 5655 (February 7, 2007) (proposed rule) (noting a 23.5% TAC quota for trawl CPs between 1997 and A85).

On September 4, 2007, the NMFS updated the FMP for groundfish of the BSAIMA with Amendment 85, which sets forth new allocations for the TAC of Pacific cod that each of nine sectors may catch annually. Fisheries of the Executive Economic Zone Off Alaska, Pacific Cod Allocations in the Bering Sea and Aleutian Island Management Area, 72 Fed. Reg. 50788 (September 4, 2007) (codified at 50 C.F.R. pt. 679). For the first time since the MSA, trawl CPs were divided between AFA trawl catcher processors (part of the fleet granted pollock fishing rights under the AFA) and non-AFA trawl catcher processors (those who had no pollock fishing rights). 72 Fed. Reg. at 50788. Because AFA trawl CP vessels were now limited in their amount of Pacific cod by a direct allocation, there was no longer a

need for the 6.1% sideboard limit imposed by the AFA. The sideboard was phased out.

The North Pacific Council, which has authority over the BSAIMA, sought the adoption of A85 because "[g]rowing demand for Pacific cod, a fully exploited fishery, and other distributional concerns among sectors led the Council to consider a[n] . . . action to revise allocations of Pacific cod among the many BSAI[MA] groundfish sectors." 72 Fed. Reg. at 5657. Revision of allocations had become necessary because current allocations meant that "one or more sectors are typically unable to harvest their annual allocation of the Pacific cod TAC." 72 Fed. Reg. at 5655. "Thus, to provide an opportunity for the full harvest of BSAI Pacific cod non-CDQ TAC, existing allocations of Pacific cod that are projected to be unharvested by some sectors are annually reallocated by NMFS to other sectors." *Id.* "Since BSAI Pacific cod sector allocations have been in effect, NMFS has reallocated Pacific cod each year from the trawl and jig sectors to fixed gear sectors." *Id.*; *See also* Fishery Management Council, Public Review Draft: Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Proposed Amendment 85 iii-iv and Table E-1 (March 12, 2006) (hereinafter "EA/RIR/IRFA") (noting that between 2000 and 2004, trawl CPs reallocated 19% of their sector's quota). The NMFS also carried out other more minor reallocations. *Id.*

The problem statement setting forth the objectives of A85 reads as follows:

The BSAIMA Pacific cod fishery is fully utilized and has been allocated among gear groups and to sectors within gear groups. The current allocations among trawl, jig, and fixed gear were implemented in 1997 (Amendment 46) and the CDQ [Community Development Quota] allocation was implemented in 1998. These allocations are overdue for review. Harvest patterns have varied significantly among the sectors resulting in annual in-season re-allocations of TAC. As a result, the current allocations do not correspond with actual dependency and use by sectors.

Participants in the BSAIMA Pacific cod fishery who have made significant investments and have long-term dependence on the resource need stability in the allocations to the trawl, jig, fixed gear and CDQ sectors. To reduce uncertainty and provide stability, allocations should be adjusted to better reflect historic use by sector. The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors.

As other fisheries in the BSAIMA and GOA are incrementally rationalized, historical participants in the BSAIMA Pacific cod fishery may be put at a disadvantage. Each sector in the BSAIMA Pacific cod fishery currently has different degrees of license requirements and levels of participation. Allocations to the sector level are a necessary step on the path towards comprehensive rationalization. Prompt action is

needed to maintain stability in the BSAIMA Pacific cod fisheries.

72 Fed. Reg. at 5657. In pursuing socioeconomic factors, the North Pacific Council stated that it was particularly interested in expanding entry-level, local opportunities to fish cod for coastal Alaskan communities that may be under-represented due to the high fixed cost barrier to entry present in other fishing methods. *Id.*

The Council aimed to allocate Pacific cod based on the average of catch history. The pre-A85 and post A85 allocations can be summarized as follows (all numbers are a percentage of TAC):

SECTOR	Pre-A85	A85	Average Retained Harvest (1995-2003)	Recent Average Retained Harvest (2000-2003)
Jig	2.0	1.4	0.1	0.1
Hook-and-line/ pot-CV	0.7	2.0	0.4	0.7
Hook-and-line CP	40.8	48.7	49.1	49.4
Pot CV (60 ft +)	7.6	8.4	8.6	9.0
AFA Trawl CP	23.5	2.3	2.2	1.5
Non-AFA Trawl CP	23.5	13.4	13.4	16.0
Trawl CV	23.5	22.1	24.0	21.6

72 Fed. Reg. at 5659, Table 3: Current and Proposed

Allocations of BSAIMA Pacific cod non-CDQ TAC and Average Harvest Share by Sector (percent) (emphasis added). When it began its analysis in 2003, the Council considered alternative options for the data that should be used in determining the historical catch. The Council selected the most expansive set of years, choosing to analyze catch history data from 1995, when allocations began, to 2003. In April 2006, the Council voted to take final action and propose new sector allocations, including providing the non-AFA trawl CP sector with a 13.4% share of the TAC. Fishermen's points out that these allocations have a significant financial impact on fisheries as each percent of the TAC allocated represents approximately $ 2 million in revenue.

By that time further catch history data from 2004 and 2005 was available. The non-AFA trawl CP sector had an average of 17.7 percent of the retained harvest between 2004 and 2005. 72 Fed. Reg. at 5660, Table 4: Average Share (percent) of Retained Harvest 2004-2005. Whereas the data from 1995 to 2003 was processed based on fish tickets, which issue only upon sale or transfer of fish, the 2004 and 2005 data was extrapolated from observer estimates. Further, observer coverage varied between sectors. *Id.*

The Council disregarded the 2004 and 2005 data because it considered it inequitable to favor the trawl CP sector, which in response to high market demand for Pacific cod and in anticipation of A85's evaluation of usage, had been able, thanks to its prior over-allocation, to increase steadily its Pacific cod fishing, while other sectors which suffered from under-allocation, remained limited to smaller usage. Thus, the Council "considered [the 2004-2005] data . . . to illustrate recent harvest

trends," but did not rely upon them in establishing allocations.

Consistent with the problem statement, the Council allocated higher than the average historical catch to those sectors that would most benefit coastal Alaskan communities: the small fixed gear sector, 77% of which is comprised of residents of coastal Alaskan communities, and the jig sector, which uses coastal processing facilities. In justifying the non-AFA trawl CP sector's allocation, the Council also noted that the trawl sectors had never "funded" allocation increases for the entry-level small fixed gear CV sector above its historic average, that CV sectors contribute more to the economy of coastal communities than CP sectors (because of onshore processing), and that CV sectors had suffered greater impacts from restrictions to protect Stellar sea lions.

Re-allocations also occurred based on the need to preserve a "directed cod" fishery for various sectors. The term "directed" fishery refers to whether vessels intend to catch that particular species of fish or whether the fish is caught incidentally. Fish caught incidentally are known as "bycatch." Vessels previously would discard the dead or dying bycatch back into the sea although some were kept for sale. Because of the waste and detrimental environmental effects of this practice, MSA National Standard 9 requires that bycatch be minimized. 16 U.S.C. § 1851(a)(9). Accordingly, in 1997, the NMFS required vessels to retain all, or specified amounts of, pollock and Pacific cod, by adopting Amendment 49 for the BSAIMA FMP. 62 Fed. Reg. 63, 880, 63, 890 (Dec. 3, 1997) (codified at 50 C.F.R. § 679.27). In proposing A85, the Council

sought to allocate enough Pacific cod TAC to the AFA trawl CP sector so it could maintain the "minimum necessary" for a directed Pacific cod fishery. The Council was motivated by the fact that the AFA trawl CP sector was efficient in its Pacific cod fishing, with a higher percentage of its allocation being used up by directed fishing. The Council also made the decision to favor those with less bycatch by counting pre-1997 historical catch data even though that data did not include bycatch.

Fishermen's contends that the North Pacific Council allocated Pacific cod TAC to the AFA trawl CP sector as part of an impermissible and arbitrary political compromise in order to ensure that one sole vessel of that fleet, the *Katie Ann*, had a directed cod fishery. Councilman Fuglvog expressed concern about whether the AFA trawl CP sector allocation would be sufficient to allow the *Katie Ann* to continue its directed cod fishery. In response, Councilwoman Salveson stated that "this action is intended to . . . establish allocation to better reflect historic use by sector . . . not to provide for a directed fishery for any one vessel." Final allocations to the AFA trawl CP sector were within the range calculated based on historic use.

On February 7, 2007, the NMFS published its proposed rule and request for comments. 72 Fed. Reg. at 5654. On September 4, 2007, it promulgated its final rule and published the comments and responses. 72 Fed. Reg. at 50788. There were numerous comments addressing the allocation of cod to non-AFA trawl CPs. *See, e.g.*, 72 Fed. Reg. at 50793 (Comment 3), 50795 (Comments 6 and 9), 50796 (Comment 11), 50798 (Comment 16).

On October 4, 2007, Fishermen's filed this action in federal court challenging A85 under the judicial review powers over regulations promulgated under the MSA, including FMPs, granted by the APA. 16 U.S.C. § 1855(f)(1) & (2). The district court upheld Secretary's decision in a summary judgment order on December 5, 2008. It held that (1) A85's allocations were rationally connected to the objectives set forth in the problem statement and resulted in a fair and equitable result as required by National Standard 4; (2) the inclusion of the 1995-1997 years and exclusion of the 2004-2005 years in calculating historical catch data was not a failure to consider the best scientific information available under National Standard 2; (3) the allocation to the AFA trawl CP sector was not a political compromise merely for the benefit of the *Katie Ann*; and (4) the allocations did not create an adverse impact in violation of the AFA by robbing the non-AFA trawl CP sector to benefit the AFA trawl CP sector. Fishermen's has timely appealed. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1).

II

A

Fishermen's contends that the Secretary violated National Standard 2 and National Standard 4 in promulgating A85. Further, Fishermen's contends that A85 creates an adverse impact on non-AFA vessels in violation of the AFA.

"This Court reviews a district court's decision to grant summary judgment *de novo* with all facts read in the light most favorable to the non-moving party." *Yakutat*,

Inc. v. Gutierrez, 407 F.3d 1054, 1066 (9th Cir. 2005)(*quoting Covington v. Jefferson County*, 358 F.3d 626, 641 n.22 (9th Cir. 2004)). In reviewing regulations promulgated under the Magnuson Act, "our only function is to determine whether the Secretary [of Commerce] 'has considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996) (*quoting Wash. Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1440-41) (9th Cir. 1990)). "We determine only if the Secretary acted in an arbitrary and capricious manner in promulgating such regulations." *Alliance Against IFQs*, 84 F.3d at 345. "Under the APA, we will reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Lands Council v. Powell*, 379 F.3d 738, 743 (9th Cir. 2004), amended by 395 F.3d 1019 (9th Cir. 2005).

B

To be valid A85 must be consistent with the National Standards presented in the Magnuson-Stevens Act. 16 U.S.C. § 1854; *see Yakutat*, 407 F.3d at 1058 (The Fishery Management Plans . . . must be consistent with the "national standards" described in the Magnuson Act."). The regulations implementing National Standard 4 require that motives for new allocations be "justified in terms of the objectives of the FMP." 50 C.F.R. § 600.325(c)(3)(i)(A). Fishermen's argues that, because A85 reduces the non-AFA trawl CP allocation below Fishermen's definition of "historical use," the changed quota fails to meet the stated objectives. Fishermen's contrasts the problem statement, which points out that pre-A85 allocations did not reflect

"actual dependency and use," with the new regulations that reduce their share below their actual average usage in 2004 and 2005. 72 Fed. Reg. at 5657. Fishermen's narrowly focuses on this one clause at the expense of a more comprehensive, coherent reading of the entire statement. While the final problem statement does begin describing, among other concerns, a discrepancy between allocations and actual use, it specifically provides that the basis for future allocations "will be catch history" and other socioeconomic considerations. 72 Fed. Reg. at 5657. Fishermen's was allocated an annual TAC that was the average of their historic usage of Pacific cod from 1995 to 2003. In terms of socioeconomic and community factors, their share was reduced in part to fund the entry-level small fixed gear sector of coastal Alaskan residents.

Fishermen's also attempts a novel combination of National Standard 4 of the MSA with 211(a) of the AFA. Fishermen's points out that National Standard 4 forbids excessive privileges to one group while 211(a) forbids adverse impacts caused by any unfair advantages to the AFA vessels. Fishermen's then would have us conclude that A85, by shifting percentage points in its final allocation from the non-AFA trawl CP sector to the AFA trawl CP sector, violated both. The Council, however, may under National Standard 4, "impose a hardship on one group if its outweighed by the total benefits received by another group or groups." *Id.* § 600.325(c)(3)(i)(B). As noted above, part of the reduction was due to socioeconomic factors leading the Council to fund sectors that favor growth for coastal Alaskan residents. Further, whatever shift in percentage points that could

be "traced" from the non-AFA trawl CP sector to the AFA trawl CP sector was rationally justified by the need to preserve the more efficient directed cod fishery of the latter. As for 211(a), we discuss it separately and do not believe there is any statutory confluence that requires special treatment of 211(a) with National Standard 4.

Fishermen's attempts to combine the requirements of AFA 211(a) with National Standard 4, by claiming the NMFS was required to analyze specifically any adverse impact A85 would have on the non-AFA trawl CP sector caused by benefitting the AFA trawl CP sector. As explained below, however, if anything, A85 had an adverse impact on the AFA trawl CP sector, thus, there can be no reasonable expectation that the NMFS should analyse a non-existent harm.

Fishermen's has failed to demonstrate that the allocation, although disadvantageous to them, was not fair or equitable in furthering the beneficial objectives of the FMP. Thus, A85 comports with National Standard 4.

Fishermen's makes a related argument that the NMFS failed to analyze the impact of the allocations under National Standard 4 by failing to consider its "potential" loss of a directed cod fishery. The regulations state that "the Council should make an initial estimate of the relative benefits and hardships imposed by the allocation." 50 C.F.R. § 600.325(c)(3)(i)(B). However, the EA/RIR/IFRA demonstrates that the Council did consider the impact of the changes on the non-AFA trawl CP sector. For example, the Council considered the extent limitations on bycatch would prevent a

direct cod fishery for the trawl sector, and noted that separate allowances would prevent the non-AFA trawl sector from closing down directed cod fishing for the entire trawl sector. Further, the responses to the comments published with the final rule show that the NMFS determined that, even under a "worst case scenario," the non-AFA trawl CP sector would be able to maintain a directed cod fishery. *See* 72 Fed. Reg. at 50799, 50801. The National Standards do not require any particular outcome with respect to allocations; rather, they provide a framework for the Council's analysis. There is nothing in the MSA that guarantees Fishermen's a directed cod fishery. Fishermen's is to a certain extent a victim of its own success, because the greater its operations for other fish species, inevitably the greater its incidental bycatch of Pacific cod. One of the BSAIMA FMP's objectives under the MSA is "conservation and management." Accordingly, under National Standard 9, the FMPs, and the amendments thereto, must minimize bycatch. The Council is not tied down by the need to allocate in order to preserve directed cod fisheries for participants with high levels of bycatch. The Council fulfilled its obligations under the framework by analyzing the impact of the new allocations on the non-AFA trawl CP sector. Thus, none of the Secretary's actions on this issue were arbitrary or capricious. *Alliance Against IFQs*, 84 F. 3d at 345.

C

Under National Standard 2, conservation and management measures "shall be based upon the best scientific information available," 16 U.S.C. § 1851(a)(2), which, "includes, but is not limited to, information of a biological, ecological, economic, or social nature." 50

C.F.R. § 600.315(b)(1). Fishermen's argues that the Council failed to consider the most relevant data in developing the new allocations. Fishermen's asserts that the Council considered data that was too old and no longer relevant to reallocation information, and failed to consider the relevance of the most recent available data. Fishermen's further argues that instead of basing the decision on "scientific analysis" it was an "arbitrary political compromise."

Fishermen's maintains that the older catch history data analyzed by the Council was irrelevant. They argue that any data collected before 1998 is particularly misleading because catch regulations changed in 1998. In support, Fishermen's point out that in A80, a concurrent amendment designed to reorganize all species fishing in the BSAIMA, pre-1998 data was ignored because there was a concern the data would fail to best "represent the traditional harvest patterns of the [A]80 sector." 72 Fed. Reg. at 52688 (A80 Final Rule). The Council, however, stated its rationale for including the older data in A85. The year of 1995 was selected as a starting point because it immediately followed the first Magnuson-Stevens Act allocations. The Council acknowledged that there were intervening events that may have changed the circumstances of the allocations, in particular the 1998 AFA legislation and 2001 attempts to protect the Steller sea lion. For example, the passing of the AFA legislation pushed the non-AFA trawl sector into increased cod fishing. The AFA, however, pushed all non-AFA Pacific cod participants into increased Pacific cod use, not just Fishermen's. The key difference is that because Fishermen's belonged to a sector with one of the most significant over-allocations prior to A85, it was one of

the few who could increase its usage without being limited by its allocation in response to the AFA. If the Council focused exclusively on post 1999 data, it would benefit Fishermen's unfairly while ignoring long-term harvest trends for the industry as a whole not just Fishermen's sector.

Further, the data Fishermen's disputed was not the only National Standard 2 data the Council was allowed to rely on in making its decision, considering the objectives of the FMP. The Council also made reallocations based on sociological data, which pointed towards increasing allocations to the small gear sector that consisted mainly of coastal Alaskan residents.

Finally, it is evident that the Council examined several potential data sets before selecting the range including 1995 to 1998. Even with regards to the selection of the years in question, the Council determined that a smaller set of years would produce skewed results based on a too narrow view of market demand for cod in those years. In other words, although the AFA legislation and Stellar sea lion protection measures were significant variables that did threaten to render pre-1998 data misleading, the Council "justified its choice," as required by 50 C.F.R. § 600.315(b)(1), to include the pre-1998 data because it believed a host of other variables were influencing catch history and a more accurate representation could only be reached by broadening the set of years to include all years with comparable data since allocations began. Ultimately, any selection of data inherently places one party at a disadvantage; Fishermen's has failed to demonstrate how this selection of this data was arbitrary or capricious. The Council stated a permissible rationale

for including pre-1998 data and nothing in the record of the Council's deliberations on this issue appears capricious or contrary to the evidence. *See Yakutat, Inc.*, 407 F.3d at 1067 (Council "drew a rational line" by omitting 1999 from analysis of which boats to include in Pacific cod fishery because those boats omitted as a result not dependent on that one species).

D

Fishermen's argues that the Council failed adequately to consider data from the two most recent catch years (2004 and 2005). Fishermen's relies on the requirement that FMP's must incorporate new information as it becomes available where practicable. 50 C.F.R. § 600.315(b)(2). The Secretary concluded that, "[t]he Council and NMFS considered more recent (2004 and 2005) harvest data from the NMFS catch accounting database in reviewing harvest history to illustrate recent harvest trends as that information became available, but it was not available in the same format as the data from 1995 through 2003." *See* 72 Fed. Reg. at 50793-94 (Comment 3 and Response). For 1995 to 2003, the Council had data from Federal Weekly Production Reports and Alaska Department of Fish and Game fish tickets. The NMFS noted that using a set based on retained harvest from 1995-2003 was more accurate than using data from later years because the latter is based on observer estimates. 72 Fed. Reg. at 50793. To use observer data would be inequitable because certain sectors, such as the AFA trawl CP group, are observed more carefully than others who would have to rely on extrapolated data. *Id.* In fact, fish tickets only became available in raw data form for the 2004 and 2005 years in March 2006, a month prior to the Council issuing its

proposed allocations. Given the time needed to process the information, and the fact that the Council's deliberations were coming to a close after more than two years, incorporating the new information was not "practicable" and so need not have been considered under National Standard 2. *See* 50 C.F.R. § 600.315(b) (if new information becomes available between initial drafting and NMFS review, it "should be incorporated into the final FMP *where practicable*.") (emphasis added).

The Secretary also contends that the Council did take into account data for 2004 and 2005, even if those numbers did not form the basis for the final historical catch numbers. As a review of the Secretarial Review Draft of A85 demonstrates, data from 2004 and 2005 was analyzed. The Council noted that the non-AFA trawl CP sector had a harvest share in 2004 that was greater than any other year. *Id.* at 273. However, the NMFS noted that, despite this increase in harvest, the higher 2004 and 2005 numbers did not mean that the combined trawl CP sector was catching its entire allocation. 72 Fed. Reg. at 50794. In part, the Council discounted this recent data because of unusually high market demand for Pacific cod in those years, as well as "the likelihood of competition for Pacific cod among sectors in anticipation of this action." Because of its prior over-allocation, Fishermen's belonged to a sector that could increase its usage in response to these incentives, unlike other sectors. The Secretary provided a rational explanation for the Council's action: the Council did not wish to reward Fishermen's sector for their prior over-allocation by perpetuating it while telling the other sectors they did not need bigger

allocations because they had maximized their current allocations.

The record shows that the Council also considered the best available sociological data, which indicated that TAC percentage needed to be subtracted from other sectors to benefit the coastal Alaskan communities. The need to maintain consistency in data and treat all sectors equally is an ample justification for using the 1995-2003 data. It was not practicable to include the 2004-2005 data. The Secretary's decision in this regard was neither arbitrary nor capricious.

E

Fishermen's point to the Council's treatment of the *Katie Ann*, an AFA trawl CP vessel, for the argument that inappropriate political considerations interfered with rational decision making. Regulations that are "a product of pure political compromise" in the absence of scientific justification will generally be viewed as arbitrary and capricious. *Midwater Trawlers Co-operative v. Dep't of Commerce*, 282 F.3d 710, 720-21 (9th Cir. 2002) (specific allocation of fishing rights to Indian tribe not based on scientific rationale in violation of MSA). While the Council had considered allocating 1.5% of the TAC to the AFA trawl CP sector, they increased the quota to this sector to 2.3% based, in part, on the concern that the *Katie Ann* would not be able to maintain its directed cod fishery. In other words, absent an increased allocation, ships like the *Katie Ann* would only be able to catch cod as bycatch during their directed pollock fishery. A Council member noted there were "negotiations and discussions" that led to the increased allocation. Reading the record as a whole, it is

clear that the Council considered not just the *Katie Ann* in the context of maintaining a directed cod fishery, but the sector as a whole and its historic use. As the Secretary points out, however, ample rational and scientific reasons supported the final allocations, which reflected Fishermen's historic usage. In fact, the agency acted consistently with its original position, which had always been to allocate the AFA trawl sector between 0.9% and 3.7% and the non-AFA trawl CP sector between 12.7% and 16.2%, based on historical usage. Furthermore, the AFA trawl CP sector, with a much smaller allocation than the non-AFA trawl CP sector, was managing to maintain a directed cod fishery because it had less bycatch as a proportion of its Pacific cod fishery. Under National Standard 9, which requires bycatch to be minimized, the Council's decision to ensure the continuance of the directed cod fishery had practical conservation and management objectives, not political ones. Thus, political concerns did not predominate as they did in *Midwater Trawlers Co-operative*, 282 F.3d at 720-21, where the final agency decision was *pure* political compromise, as the agency did not engage in *any* scientific analysis.

F

The AFA requires that the Council shall manage the BSAIMA in a way to protect non-AFA vessels from adverse impacts of the directed pollock monopoly. 16 U.S.C. § 1851, note, AFA 211(a).[1] Fishermen's claims A85 has such an adverse impact because it "robs" the non-AFA trawl CP sector to benefit the AFA trawl CP sector. Before A85, the trawl CP's were one sector allocated 23.5% of the TAC. *See* 72 Fed. Reg. at 5659. The AFA itself protected the non-AFA trawl CP sector

by allocating to the AFA trawl CP sector a "sideboard" limit of 6.1% of Pacific cod catch. AFA § 211(b)(2)(A). A85 effectively replaces this protection by splitting the two sectors and allocating each a set allocation, with the non-AFA trawl CP sector limited to 13.4% and the AFA trawl CP sector to 2.3%. The substance of Fishermen's argument is that A85 causes "adverse impact" as defined in 211(a) because the historic catch of the non-AFA sector was higher than its A85 allocation whereas the historic catch of the AFA sector was lower than its A85 allocation. Fishermen's argument that they were injured in violation of 211(a) ignores the fact that 211(a) as defined in the AFA permitted greater impact by the AFA sector on the non-AFA sector than A85 effectuates. The AFA-imposed sideboard permitted the AFA sector to fish for 26%[2] of the total Pacific cod of the trawl CP sector, whereas of the total post-A85 allocation, the AFA trawl CP sector had only 14.6%[3] of the total. Thus, the AFA trawl CP sector's supposed encroachment on the non-AFA trawl CP sector was actually greatly reduced by A85 as compared to the AFA itself, which is the source of rights Fishermen's would supposedly have us rely on. The question is not whether the A85 limits on AFA vessels are less restrictive than historical usage, but whether they are greater than the impact legally allowed by the AFA. They are not. Hence, A85 does not run afoul of the American Fisheries Act.

CONCLUSION

We are persuaded that the Secretary did not act arbitrarily and capriciously in approving Amendment A85. As we noted in *Alliance*, "[t]he Secretary is allowed, under [controlling precedent], to sacrifice the

interest of some groups of fishermen for the benefit as the Secretary sees it of the fishery as a whole." 84 F. 3d at 350. Here the interests of Fishermen's were sacrificed for the benefit of the fishery as a whole, as the Secretary favored sectors that benefitted coastal Alaskan residents, and selected data that would reduce prior unintended favoritism to the non-AFA trawl CP sector, to which Fishermen's belonged.

AFFIRMED.

Footnotes

*Gary Locke is substituted for his predecessor as Secretary of the United States Department of Commerce. Fed. R. App. P. 43(c)(2).

1 Fishermen's attempts to combine the requirements of AFA 211(a) with National Standard 4, by claiming the NMFS was required to analyze specifically any adverse impact A85 would have on the non-AFA trawl CP sector caused by benefitting the AFA trawl CP sector. As explained below, however, if anything, A85 had an adverse impact on the AFA trawl CP sector, thus, there can be no reasonable expectation that the NMFS should analyse a non-existent harm.

2 6.1% divided by 23.5%.

3 2.3% divided by (2.3% + 13.4%).

CLIFTON, Circuit Judge, dissenting:

The American Fisheries Act of 1998 ("AFA") granted a lucrative monopoly in pollock fishing rights to 20 vessels operating in the BSAIMA (described as "AFA trawl CP vessels"). The AFA compensated fishing vessels not favored by the pollock monopoly ("non-AFA vessels") by charging the North Pacific Council with protecting them from the monopoly's adverse effects. Specifically, the Council's Fishery Management Plans ("FMPs") must "protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by this Act or fishery cooperatives in the directed pollock fishery." 16 U.S.C. § 1851, note, AFA § 211(a). I conclude that Amendment 85 ("A85") violates this protective mandate by directly allocating Pacific cod to the AFA sector to the detriment of the non-AFA trawl CP sector. Additionally, the Council's use of pre-AFA data to calculate "catch history" violates National Standard 2 of the Magnuson-Stevens Act ("MSA"), a requirement that FMPs employ "the best scientific information available." 16 U.S.C. § 1851(a)(2). As a result, I respectfully dissent.

I. AFA § 211(a)

In A85, the Secretary and the Council abdicated their responsibility to protect non-AFA vessels by granting the already privileged AFA trawl CP sector, for the first time, a direct allocation of the total authorized catch ("TAC") of Pacific cod. That allocation was made at the expense of, among others, the non-AFA trawl CP sector, which of necessity relies more heavily on Pacific

cod after being pushed out of the pollock fishery by the AFA.

Specifically, A85 grants the AFA trawl CP sector a direct allocation of 2.3% of the Pacific cod TAC -- a portion well above that sector's historic Pacific cod harvest. At the same time, A85 reduces the non-AFA trawl CP sector's allocation to 13.4% of the Pacific cod TAC -- a portion well below that sector's recent harvests and below even its historic average as calculated by the Council. (As discussed below, there is reason to question the Council's calculation.) The ahistoric character of the new allocations calls into question the Council's professed goal for A85 of "better reflect[ing] historic use by sector." More importantly, by any reasonable measure the new allocations adversely impact the non-AFA trawl CP sector at the same time that they benefit the sector already favored with the pollock monopoly granted under the AFA.

The majority opinion seeks to rebut this assessment of A85's adverse impact on the non-AFA trawl CP sector by comparing the 6.1% "sideboard" limit formerly imposed on the AFA trawl CP sector's Pacific cod harvest to the smaller allocation made by A85 to the AFA sector. *Supra* at 1241. That misinterprets the function of the sideboard limit, which imposed a hard cap on the AFA trawl CP sector's harvest rather than granting it a direct allocation like the one the sector now enjoys under A85. The majority opinion's statement that "[t]he AFA-imposed sideboard permitted the AFA sector to fish for 26% of the total Pacific cod [allocated to the combined] trawl CP sector" is imprecise and misleading. *Id.* Instead, the 6.1% sideboard allowed the AFA sector to harvest no more

than 26% of the combined trawl CP sector's allocation; it did not actually guarantee the AFA sector *any* fraction of the total trawl CP harvest. Prior to A85, the AFA sector and the non-AFA trawl CP sector were treated as one group, subject to a single allocation. As the Secretary acknowledges, "[p]rior to A85, the non-AFA trawl CP sector could theoretically [have] harvest[ed] the entire 23.5% allocation of the Pacific cod TAC that it shared with the AFA trawl CP sector (because the AFA trawl CP sector's 6.1% sideboard was a limit rather than an exclusive allocation)."

In fact, the AFA sector never came close to harvesting 6.1% of the Pacific cod TAC. Between 1995 and 2003, the years on which the Council based its reallocation, the AFA sector's average harvest was just 1.7% of the TAC. By contrast, the non-AFA CP trawl sector's average harvest during the 1995-2003 period was 13.6% of the TAC. The allocations assigned to those sectors by A85 are 2.3% and 13.4%, respectively. Thus, even using the range of years the Council relied on to calculate "catch history" as the basis for comparison, A85 assigned the AFA sector a share of the Pacific cod fishery above historic levels while curtailing the non-AFA sector's Pacific cod fishing rights *below* its historic share.

If attention is focused on the years since adoption of the AFA, A85's adverse impact on the non-AFA trawl CP sector is even worse. In post-AFA years, between 1998 and 2003, the AFA sector's average harvest of Pacific cod was just 1.5%, substantially lower than A85's allocation of 2.3%. During those years the non-AFA trawl CP sector harvested 15.7% of TAC, yet A85 allocates only 13.4% to that group.

These numbers contradict the majority opinion's conclusion that "A85 had an adverse impact on the AFA trawl CP sector" or that the non-AFA sector is complaining of a "nonexistent harm." *Supra* at 1241 n.1. Instead, A85 grants the favored AFA sector the additional boon of independence from the formerly combined trawl CP sector's Pacific cod allocation with a margin for expansion beyond its historic Pacific cod harvest, and it inflicts on the non-AFA trawl CP sector an unmitigated loss of the Pacific cod market share (both allocated and actual) that sector cultivated in the years following its exclusion by the AFA from the pollock fishery. In sum, A85's redistribution of the Pacific cod TAC imposes on the non-AFA trawl CP section an adverse impact that § 211(a) requires the Council to guard against.

II. The Relevant History

The Council adopted the purpose of "better reflect[ing] historic use by sector" and declared "catch history" as one of three bases for determining sector allocations. Having done so, the Council was required by National Standard 2 to use "the best scientific information available" in furtherance of its stated goals. 16 U.S.C. § 1851(a)(2). Determining what time period to consider as relevant history was obviously important in evaluating historic use. The Council calculated catch history based on the years 1995 to 2003. That selection brings to mind Mark Twain's observation:

> Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often

> apply with justice and force: "There are three kinds of lies: lies, damned lies and statistics."[1]

The AFA was adopted in 1998. Prior to that time, pollock was not reserved to the chosen few fishing vessels. After the AFA changed the rules of the game by granting the AFA sector its pollock monopoly, other fishermen were required to focus on other species, notably including Pacific cod. To no one's surprise, in later years, when they couldn't catch pollock, they caught more cod. Yet the Council defined "catch history" to include several years before the AFA changed the rules.

The Council's problem statement explained its reliance on pre-AFA data by stating that

> Consideration of just three or four recent years does not show dependency of the sectors over time and may be unduly biased because of increased market demand for Pacific cod in recent years for some products, potential decreased participation due to BSAI crab rationalization, and the likelihood of competition for Pacific cod among sectors in anticipation of this action.

But these post-AFA market stimuli should make pre-AFA data less, not more, useful in reallocating Pacific cod going forward. Most importantly, the passage of the AFA in 1998 forced the non-AFA trawl CP sector to expand its Pacific cod operations to compensate for its exclusion from the pollock fishery, as the TAC shares discussed above confirm. That sector is still excluded from the pollock fishery by the AFA. The fishermen

cannot go back to 1995-1998 circumstances. The Council should not pretend that they can, but that is exactly what A85 does. Relying on pre-AFA data to calculate the catch history of post-AFA players, without making any effort to adjust for the impact of the AFA, is manifestly unreasonable.

The decisions of the Secretary and the Council are entitled to great deference, but that deference is not unchecked. I would hold that in curtailing the non-AFA vessels' rights to harvest Pacific cod while expanding those rights in AFA vessels, the adoption of A85 violated § 211(a) of the AFA, and in using pre-AFA data to calculate "historic" catch it violated National Standard 2 of the MSA.

Footnote

[1]Mark Twain, *Chapters from My Autobiography*, 185 North American Review, No. DCXVIII., July 5, 1907, at 465, 471. There is doubt as to whether the attribution of the saying to Disraeli is correct.

Case No. C07-1574MJP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FISHERMAN'S FINEST, INC., et al.,
Plaintiffs,

vs.

THE HONORABLE CARLOS M. GUTIERREZ, as he is the Secretary of the United States Department of Commerce,
Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO OF PLAINTIFFS' COMPLAINT

This matter comes before the Court on the parties' cross motions for partial summary judgment. (Dkt. Nos. 45, 46.) Plaintiffs' complaint challenges Amendments 85 ("A85") and 80 ("A80") to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area ("BSAI"). (Dkt. No. 6.) These motions for summary judgment only address counts one and two of the complaint which challenge A85's new allocations of the Total Allowable Catch ("TAC") of BSAI Pacific cod ("cod"). On October 21, 2008, this Court heard oral argument on the motions. The Court has considered the motions, the responses (Dkt. Nos. 58, 59), the parties' oral arguments, and other pertinent documents in the record. The Court GRANTS summary judgment for

Defendant on counts one and two of Plaintiffs' complaint.

Background

The Court will first summarize the regulatory framework surrounding A85 then describe the specific factual circumstances of the amendment.

A. Regulatory Framework

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Stevens Act") established a framework for the Secretary of Commerce to regulate fishing in coastal waters. 16 U.S.C. §§ 1801, et seq. The act created regional fishery management councils responsible for preparing fishery management plans ("FMPs") and amendments to such plans. 16 U.S.C. § 1852. The North Pacific Fishery Management Council ("Council") holds broad powers to present restrictions and regulations governing fisheries from Oregon to Alaska. Id. The Council submits FMP amendments to the Secretary of Commerce and National Marine Fisheries Service ("NMFS"), who must review each proposal in accordance with codified standards ("National Standards"), see 16 U.S.C. §§ 1851(a)(1)-(10), the Magnuson-Stevens Act, and all other applicable law. 16 U.S.C. § 1854(a)-(b). Once the NMFS concludes their inquiry, they place a notice in the Federal Register and begin a sixty day comment period. 16 U.S.C. § 1854(a)(1). The Secretary has thirty days after the close of the comment period to approve, partially approve, or disapprove of the amendment. 16 U.S.C. § 1854(a)(3).

Two other statutes provide context for the Court's analysis. First, the American Fisheries Act ("AFA") granted certain vessels exclusive rights to harvest BSAI Pollock. Pub. L. No. 105-277, Div. C., Title II, §§ 205-213 (Oct. 21, 1998). Second, the parties base their definition of the fishing sectors (see below) on provisions in the Consolidated Appropriations Act which defines the requirements for participation in BSAI Pacific cod fisheries. Pub. L. No. 108-44, 118 Stat. 2809 (2004).

In 1994, the Council first recommended sector allocations of the TAC of Pacific cod with Amendment 24. 50 Fed. Reg. 4009 (Jan. 28, 1994)(codified at 50 C.F.R. pt. 679). Amendment 24 only delineated three sectors: fixed gear (pot or hook-and-line gear fishing), trawl gear, and jig gear sectors. Id. In 1997, Amendment 46 divided the trawl allocation between catcher vessels ("CV ") and catcher-processors ("CP "). 61 Fed. Reg. 59029 (Nov. 20, 1996)(codified at 50 C.F.R. pt. 679). Amendments 64 and 77, passed in 2000 and 2003, respectively, further refined sector subdivisions from the original fixed gear sector into five groups. See 65 Fed. Reg. 51553 (Aug. 24, 2000)(codified at 50 C.F.R. pt. 679); 68 Fed. Reg. 49416 (Aug. 18, 2003)(codified at 50 C.F.R. p. 679). These amendments did not alter the TAC allocated to the trawl catcher-processor ("CP") group. See 72 Fed. Reg. 5654, 5655 (February 7, 2007)(proposed rule)(noting a 23.5% TAC quota for trawl CPs between 1997 and A85).

On September 4, 2007, the NMFS updated the FMP for groundfish of the BSAI with A85 which sets new allocations for the TAC of Pacific cod that each of nine sectors may catch annually. Fisheries of the Executive

Economic Zone Off Alaska, Pacific Cod Allocations in the Bering Sea and Aleutian Island Management Area, 72 Fed. Reg. 50788 (September 4, 2007)(codified at 50 C.F.R. pt. 679). Plaintiffs point out that these allocations have a significant financial impact on fisheries as each percent of the TAC allocated represents approximately $2 million in revenue. (See Dkt. No. 46 at 6.) For the first time since the Magnuson-Stevens Act, trawl CPs were divided between AFA trawl catcher processors (part of the fleet granted pollock fishing rights under the AFA) and non-AFA trawl catcher processors (those who have no pollock fishing rights). 72 Fed. Reg. at 50788. Plaintiffs operate medium-sized, non-AFA trawl catcher processors, commonly termed the "head and gut" sector in the industry. (Dkt. No. 46 at 1.)

B. Council's Fact Finding and Proposal

Originally, A85 began as a larger project to coordinate a multi-species fishing cooperative through A80. 72 Fed. Reg. at 5657; Memorandum from Robert D. Mecum, Acting Administrator, Alaska Region to William T. Hogarth, Assistant Administrator for Fisheries 171 (August 2, 2007)(hereinafter "AR Doc. 199"). The Council pursued A85 because the previous TAC allocations were outdated and required mid-season "reallocations" where one sector's quota would be transferred to another sector. 72 Fed. Reg. at 5654-55. In the years since its initial allocation among sectors, the Council frequently reallocated quota from the jig and trawl groups to hook and line sectors. North Pacific Fishery Management Council, Public Review Draft: Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis

for Proposed Amendment 85 iii-iv and Table E-1 (March 12, 2006) (hereinafter "EA/RIR/IRFA")(AR Doc. 447)(noting that between 2000 and 2004, trawl CPs reallocated 19% of their sector's quota). Reallocations occur for a variety of reasons, including insufficient efforts by a sector and difficulties catching cod with trawl gear late in the year. Id. at iv.

In its problem statement, the Council noted that reducing the uncertainty in annual allocations would help those participants who have made significant capital investments and who rely on the BSAI Pacific cod fishery. 72 Fed. Reg. at 5657. The allocations in effect did not "correspond with actual dependency and use by sectors." Id. The Council stated it would use "catch history as well as consideration of socio-economic and community factors" as the basis for determining allocations. Id. In pursuing socioeconomic factors, the Council was particularly interested in expanding entry-level, local opportunities to fish cod that may be under-represented due to the high fixed cost barrier to entry present in other fishing methods. Id.[1]

When it began its analysis, the Council considered several alternative options for what data should be used in determining the historical catch. AR Doc. 199 at 177 (listing potential ranges of years considered). The Council selected the most expansive set of years, choosing to analyze catch history data from 1995 to 2003. In April 2006, the Council voted to take final action and propose new sector allocations, including providing the non-AFA trawl CP sector with a 13.4% share of the TAC. North Pacific Fishery Management Council, Minutes of the 176th Plenary Session 20 (April 5-11, 2006) (hereinafter AR Doc. 131)(motion by McKie

Campbell to revise percentages of cod allocated). On February 7, 2007, the NMFS published its proposed rule and request for comments. 72 Fed. Reg. at 5654. On September 4, 2007, it promulgated its final rule and provided published comments and responses. 72 Fed. Reg. at 50788. There were numerous comments addressing the allocation of cod to non-AFA trawl CPs. See, e.g., 72 Fed. Reg. at 50793 (Comment 3), 50795 (Comments 6 and 9), 50796 (Comment 11), 50798 (Comment 16). The pre A85 and post A85 allocations can be summarized as follows (all numbers are a percentage of TAC):

SECTOR	Pre A85	A85	Average Retained Harvest (1995-2003)	Recent Average Retained Harvest (2000-2003)
Jig	2.0	1.4	0.1	0.1
Hook-and-line/ pot-CV	0.7	2.0	0.4	0.7
Hook-and-line CV (60 ft +)	0.2	0.2	0.1	0.3
Hook-and-line CP	40.8	48.7	49.1	49.4
Pot CV (60 ft +)	7.6	8.4	8.6	9.0
AFA Trawl CP	23.5	2.3	2.2	1.5
Non-AFA Trawl CP	23.5	13.4	13.4	16.0
Trawl CV	23.5	22.1	24.0	21.6

72 Fed. Reg. at 5659, Table 3: Current and Proposed Allocations of BSAI Pacific cod non-CDQ TAC and Average Harvest Share by Sector (percent)(emphasis added). According to a data set different from the one captured above, the non-AFA trawl CP sector had an average of 17.7 percent of the retained harvest between 2004 and 2005. 72 Fed. Reg. at 5660, Table 4: Average Share (percent) of Retained Harvest 2004-2005.

On October 15, 2007, Plaintiffs filed their amended complaint. (Dkt. No. 6.) Count one of Plaintiffs' complaint asserts that A85 is not rationally related to the Council's stated goal and runs afoul of National Standard 4 of the Magnuson-Stevens Act. (Dkt. No. 6 at 21-22.) Count two argues that that A85 violates the AFA by failing to protect non-AFA vessels from the adverse affects of the AFA trawler vessels. (Id. at 22-23.) The parties' current motions only address these two counts. (Dkt. Nos. 45, 46.)

Discussion

I. Jurisdiction and Standard of Review

Pursuant to the Administrative Procedures Act ("APA"), findings of agency actions are reviewable by federal district courts. See 5 U.S.C. §§ 551-59, 701-706; see also Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1235 (9th Cir. 2001). In reviewing this type of regulation, the Court applies the two-step test articulated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). First, the Court must inquire whether Congress has spoken to the precise question at issue. If it has, the Court must give effect to the unambiguously

expressed intent of Congress. Id. The Court may look to the statute's language, history, and purpose, and may apply canons of statutory construction in ascertaining whether Congress has spoken directly and unambiguously to a particular issue. Id. at 843 n.9; Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs., 946 F.2d 4, 6 (1st Cir. 1991). If the statute is ambiguous, the Court must determine whether the agency's interpretation of the statute is permissible. Chevron, 467 U.S. at 843. The parties here focus their arguments on whether the regulations were supported by a rational basis, Chevron 's second step.[2]

If a regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," a district court may set aside the agency's action. 5 U.S.C. § 706(2)(A); see also Chevron, 467 U.S. at 844. The arbitrary and capricious inquiry asks whether the challenged agency presented a "rational connection between the facts found and the choice made." Arizona Cattle Grower's Ass'n, 273 F.3d at 1236. Though the standard is highly deferential to the agency, a court may find a regulation to be arbitrary and capricious if an agency relies on factors Congress did not intend for it to analyze, if it presents an explanation that is contrary to the evidence, or if it simply ignores an essential component of the problem. Yakutat, Inc. v. Gutierrez, 407 F.3d 1054, 1067 (9th Cir. 2005)(citations omitted).

II. Disputed Issues

Pursuing the belief that "good fences make good neighbors," the NMFS's goal in dividing the TAC

between different sectors is to create allocations that can be fished without incursion from competing sectors. 72 Fed. Reg. at 5655. Plaintiffs' central allegation is that the NMFS has arbitrarily moved their fence. The parties dispute (1) the relationship between A85 and its stated objectives, (2) the appropriateness of the data used, (3) whether improper political considerations influenced the decision-making process, (4) whether the Council balanced hardships, and (5) whether the Council adequately considered Plaintiffs' protections under the AFA.

a. A85 and the Council's Problem Statement

For A85 to be valid, it must be consistent with the National Standards presented in the Magnuson-Stevens Act. 16 U.S.C. § 1854; see also Yakutat, 407 F.3d at 1058. The regulations implementing National Standard 4 require that motives for new allocations "justified in terms of the objectives of the FMP." 50 C.F.R. § 600.325(c)(3)(i)(A). Plaintiffs argue that, because A85 reduces the non-AFA trawl CP allocation from levels they enjoyed before the regulation, the changed quota fails to meet the stated objectives. (Dkt. No. 46 at 28.) They contrast the problem statement, which points out that pre-A85 allocations did not reflect "actual dependency and use," with their new regulations that reduce their share. 72 Fed. Reg. at 5657; (Dkt. No. 46 at 28.) Plaintiffs narrowly focus on this one clause at the expense of a more comprehensive, coherent reading of the entire statement. While the final problem statement does begin describing, among other concerns, a discrepancy between allocations and actual use, it specifically provides that the basis for future allocations "will be catch history" and other

socioeconomic considerations. 72 Fed. Reg. at 5657.

Plaintiffs further contrast NMFS's desire to decrease uncertainty with the uncertainty facing the non-AFA trawl CP sector in the aftermath of the regulation. (Dkt. No. 46 at 27-28.) Plaintiffs do not argue, however, that there will be industry-wide uncertainty after the new regulation. Rather, they argue that reducing the non-AFA trawl CP sector's allocation creates instability by reducing their ability to conduct a directed cod fishery. (Dkt. No. 46 at 28.) Again, Plaintiffs' reading of the problem statement is too narrow. Uncertainty as a concept has to be read in context of the goal of "comprehensive rationalization" of the BSAI allocations. 72 Fed. Reg. at 5657. Even if the non-AFA trawl CP sector must conduct a reduced directed fishery in the future, they have not explained how that creates inherent instability. They point to their lost revenue, but stability and profitability are two distinct concepts. (Dkt. No. 46 at 28.) Plaintiff has failed to demonstrate that the new regulations will lead to future instability beyond any adjustment in operations to match the new quotas.

b. Data Analyzed

Plaintiffs' second factual allegation is that the Council failed to consider the most relevant data in developing the new allocations. (Dkt. No. 46 at 29.) Plaintiffs argue that the Council considered data that too old and no longer relevant to reallocation information and that the Council failed to consider the most recent, most relevant data available.

i. Pre-1998 Data

First, Plaintiffs argue that older catch history data analyzed by the Council are irrelevant to the stated problem. They argue that any data collected before 1998 is particularly misleading because catch regulations changed in 1998. (Dkt. No. 46 at 30(citing changes requiring 100% mandatory retention of cod).) In support, Plaintiffs point out that in he development A80, pre-1998 data was ignored because there was a concern the data would ail to best "represent the traditional harvest patterns of the [A]80 sector." (Dkt No. 59 at 9); 72 Fed. Reg. at 52688 (A80 Final Rule). The Council, however, stated its rationale for including he older data: 1995 was selected as a starting point because it immediately followed the first Magnuson-Stevens Act allocations. Memorandum from Robert D. Mecum, Acting Administrator, Alaska Region to William T. Hogarth, Assistant Administrator for Fisheries 2 March 5, 2007)(hereinafter "AR Doc. 197"). Though the Council acknowledged that there were intervening events that may have changed the circumstances of the allocations (in particular the 1999 AFA legislation and 2001 attempts to protect the Steller sea lion), they determined that a smaller set of years would produce skewed results based on a too narrow view of market demand for cod in those years. Id. Furthermore, it is evident that the Council examined several potential data sets before selecting the range including 1995 to 1998. AR Doc. 199 at 177. Any selection of data inherently places one party at a disadvantage; Plaintiffs have failed to demonstrate how this selection of this data was arbitrary or capricious. In the Court's view, the Council's stated a permissible rationale for including pre-1998 data and nothing in the

record of the Council's deliberations on this issue appears capricious or contrary to the evidence. Yakutat, Inc., 407 F.3d at 1067.

ii. 2004-2005 Data

Second, Plaintiffs argue that the Council failed to adequately consider data from the wo most recent catch years (2004 and 2005). (Dkt. No. 46 at 31-32.) National Standard 2 requires that management decisions be "based upon the best scientific information available." 16 U.S.C. § 1851(a)(2).

First, Defendant responds that 2004 and 2005 data was not available in the same format for the final two years and, thus, could not be used as the basis for historical catch. See 72 Fed. Reg. at 50793-94 (Comment 3 and Response). For 1995 to 2003, the Council had data from Federal Weekly Production Reports and Alaska Department of Fish and Game fish tickets. AR Doc. 199 at 366, Table 3-69; see also (Dkt. No. 45 at 23)(NMFS blend data and catch accounting database used for 2004 and 2005). The NMFS noted that using a set based on retained harvest from 1995-2003 was more accurate than using "blend data" from later years was appropriate because the latter is based on observer estimates. 72 Fed. Reg. at 50793. To use observer data would be inequitable because certain sectors, such as the AFA trawl CP group, are observed more carefully than others who would have to rely on extrapolated data. Id.

Second, Defendant argues that the Council did take into account data for 2004 and 2005, even if those numbers did not form the basis for the final historical catch

numbers. (Dkt. No. 58 at 3.) A review of the Secretarial Review Draft of A85 demonstrates, data from 2004 and 2005 were analyzed. AR Doc. 199 at 272. The Council noted that the non-AFA trawl CP sector had a harvest share in 2004 that was greater than any other year. Id. at 273. However, the NMFS noted that, despite this increased in harvest, the higher 2004 and 2005 numbers did not mean that the combined trawl CP sector was catching its entire allocation. 72 Fed. Reg. at 50794.

The Court finds that the Secretary's stated reasons for selecting the data are entirely appropriate. The need to maintain consistency in data and treat all sectors equally is an ample justification for using the 1995-2003 data. The Court finds that the Secretary's decision in this regard was neither arbitrary nor capricious.[3]

c. Arbitrary Political Considerations

Plaintiffs point to the Council's treatment of the *Katie Ann*, an AFA trawl CP vessel, for the argument that inappropriate political considerations interfered with rational decision making. Regulations that are "a product of pure political compromise" in the absence of scientific justification will generally be viewed as arbitrary and capricious. Midwater Trawlers Co-operative v. Dept. of Commerce, 282 F.3d 710, 720-21 (9th Cir. 2002). While the Council had initially considered allocating 1.5% of the TAC to the AFA trawl CP sector, they increased the quota to this sector to 2.3% based, in part, on the concern that the Katie Ann would not be able to maintain its directed cod fishery. Transcript of BSAI A85 Council Meeting at 37 (April 8-9, 2006)(AR Doc. 203). In other words, absent

an increased allocation, ships like the *Katie Ann* would only be able to catch cod as bycatch during their directed Pollack fishery. Id. at 38. A Council member noted there were "negotiations and discussions" that lead to the increased allocation. Id. at 37. Plaintiffs claim their exclusion from such negotiations made the process improperly political. (Dkt. No. 46 at 33; Dkt. No. 5 at 4.) Reading the record as a whole, it is clear that the Council considered not just the *Katie Ann* in the context of maintaining a directed cod fishery, but the sector as a whole and its historic use. See AR Doc. 203 at 38 (Salverson: "my concern . . . was not to provide for a directed fishery for any one vessel . . . but rather that the allocation . . . was not reflective of the historical usage."). Thus, political concerns did not predominate as they did in Midwater Trawlers Co-operative. 282 F.3d at 720-21.

d. Relative Hardships

Plaintiffs contend that the new allocations violate National Standard 4 of the Magnuson-Stevens Act because they are not "fair and equitable to all." 16 U.S.C. § 1851(a)(4). The regulations state that "the Council should make an initial estimate of the relative benefits and hardships imposed by the allocation." 50 C.F.R. § 600.325(c)(3)(i)(B). However, the EA/RIR/IFRA demonstrates that the Council did consider the impact of the changes on the non-AFA trawl CP sector. See EA/RIR/IFRA (AR Doc. 447) at 169-171. Further, the responses to the comments published with the final rule show that the NMFS determined that the non-AFA trawl CP sector would be able to maintain a directed cod fishery. See 72 Fed. Reg. at 50799, 50801. The National Standards do not

require any particular outcome with respect to allocations; rather, they provide a framework for the Council's analysis. The Council fulfilled its obligations under the framework by analyzing the impact of the new allocations on the non-AFA trawl CP sector. The Court believes that none of the Secretary's actions on this issue were arbitrary or capricious.

e. Failure to Protect from AFA Impacts

The AFA requires that the Council shall manage the BSAI in a way to protect non-AFA vessels from adverse impacts of the directed pollock monopoly. 16 U.S.C. § 1851, note. Plaintiffs argue that by constructively increasing the AFA trawl CP sector's allocation while reducing the non-AFA trawl CP sector's, the Council compounded the adverse effects of the AFA. Defendants simply point out that the increase over historical levels was needed to allow AFA boats to continue a directed cod fishery and retain their harvest of other fish (where cod is caught as by-catch). AR Doc. 203 at 37. A comparison of pre-A85 quotas with A85 allocations is instructive. Before A85, the trawl CPs were one sector allocated 23.5% of the TAC. See 72 Fed. Reg. at 5659. A85 divided this sector in two between AFA and non-AFA vessels, providing the non-AFA boats with a much larger allocation than their AFA counterparts (13.4% vs. 2.3%). In other words, if the Court analyzes the issue from the perspective of total trawl CP catch before A85, the AFA sector bore the brunt of the overall reduction in trawl CP allocations presented in A85. The Council has, therefore, not run afoul of the AFA's requirement to protect non-AFA vessels.

Conclusion

The Court understands that the change in the allocations has had a significant impact on Plaintiffs' vessels. The fact that they may not pursue as large a directed cod fishery in the future is, alone, not a sufficient justification for overturning the amendment. The Court does not believe the Secretary has acted arbitrarily or capriciously in developing A85. The Court further finds that A85 is supported by a rational basis. Therefore, the Court hereby GRANTS Defendant's motion for summary judgment and DENIES Plaintiffs' motion for summary judgment on counts one and two of Plaintiffs' complaint.

The clerk is directed to send a copy of this order to all counsel of record.

DATED this 12th day of November, 2008.

s/Marsha J. Pechman
HONORABLE MARSHA J. PECHMAN
United States District Court Judge

Footnotes

1 In full, the problems statement reads:

> The BSAI Pacific cod fishery is fully utilized and has been allocated among gear groups and to sectors within gear groups. The current allocations among trawl, jig, and fixed gear were implemented in 1997 (Amendment 46) and the CDQ allocation was implemented in 1998. These allocations are overdue for review. Harvest

patterns have varied significantly among the sectors resulting in annual inseason reallocations of TAC. As a result, the current allocations do not correspond with actual dependency and use by sectors.

Participants in the BSAI Pacific cod fishery who have made significant investments and have long-term dependence on the resource need stability, allocations should be adjusted to better reflect historic use by sector. The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors. As other fisheries in the BSAI and GOA are incrementally rationalized, historical participants in the BSAI Pacific cod fishery may be put at a disadvantage.

Each sector in the BSAI Pacific cod fishery currently has different degrees of license requirements and levels of participation. Allocations to the sector level are a necessary step on the path towards comprehensive rationalization. Prompt action is needed to maintain stability in the BSAI Pacific cod fisheries.

72 Fed. Reg. at 5657.

2 Plaintiff did argue in response to Defendant's motion that the Court does not need to determine whether the term "actual" in A85's problem statement is entitled to deference under Chevron because the MSA and its regulations are unambiguous. (Dkt. No. 59 at 9 and n.18.) However, as Defendant pointed out during oral

argument, the problem statement is not within the purview of a Chevron step one analysis.

3 The Court further notes that Plaintiffs' argument fails to consider the socioeconomic factors that the Secretary was required to assess in accordance with the Problem Statement.

No. 08-36024

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FISHERMEN'S FINEST INC; US FISHING LLC; NORTH PACIFIC FISHING INC, Plaintiffs-Appellants,

v.

CARLOS M. GUTIERREZ, as he is the Secretary of the United States Department of Commerce,

3/29/2010 Filed

Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:07-cv-01574-MJP. Marsha J. Pechman, District Judge, Presiding.

ORDER

Before: ALARCÓN, KLEINFELD and CLIFTON, Circuit Judges.

Judge Kleinfeld and Judge Clifton vote to deny the petition for rehearing en banc.

Judge Alarcón recommends that the petition for a rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

FILED APR 26 2010

No. 08-36024
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FISHERMEN'S FINEST INC; et al.,
Plaintiffs - Appellants,

v.

CARLOS M. GUTIERREZ, as he is the Secretary of the United States Department of Commerce,
Defendant - Appellee.

D.C. No. 2:07-cv-01574-MJP
U.S. District Court for Western Washington, Seattle

MANDATE

The judgment of this Court, entered January 19, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

Synitha Walker
Deputy Clerk

Excerpts of the American Fisheries Act, Pub. L. No. 105-277, Div. C, Title II, Subtitle I, §§ 205-213, 112 Stat. 2681-621 to 2861-637 (Oct. 21, 1998), codified at 16 U.S.C. § 1851 note

Bering Sea Pollock Fishery Act Oct. 21, 1998, P.L. 105-277, Div C, Title II, Subtitle II, 112 Stat. 2681-621; May 21, 1999, P.L. 106-31, Title III, Ch 11, 3027(a)(2)-(7), 113 Stat. 101; July 24, 2001, P.L. 107-20, Title II, Ch 2, § 2202(e)(1), 115 Stat. 170; Nov. 28, 2001, P.L. 107-77, Title II, § 211, 115 Stat. 779; Aug. 2, 2002, P.L. 107-206, Title I, Ch. 11, § 1103, 116 Stat. 884, provides:

"Sec. 205. Definitions.

"As used in this subtitle--

"(1) the term 'Bering Sea and Aleutian Islands Management Area' has the same meaning as the meaning given for such term in part 679.2 of title 50, Code of Federal Regulations, as in effect on October 1, 1998;

"(2) the term 'catcher/processor' means a vessel that is used for harvesting fish and processing that fish;

"(3) the term 'catcher vessel' means a vessel that is used for harvesting fish and that does not process pollock onboard;

"(4) the term 'directed pollock fishery' means the fishery for the directed fishing allowances allocated under paragraphs (1), (2), and (3) of section 206(b);

"(5) the term 'harvest' means to commercially engage in the catching, taking, or harvesting of fish or any activity that can reasonably be expected to result in the catching, taking, or harvesting of fish;

"(6) the term 'inshore component' means the following categories that process groundfish harvested in the Bering Sea and Aleutian Islands Management

Area:

"(A) shoreside processors, including those eligible under section 208(f); and

"(B) vessels less than 125 feet in length overall that process less than 126 metric tons per week in round-weight equivalents of an aggregate amount of pollock and Pacific cod;

"(7) the term 'Magnuson-Stevens Act' means the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.);

"(8) the term 'mothership' means a vessel that receives and processes fish from other vessels in the exclusive economic zone of the United States and is not used for, or equipped to be used for, harvesting fish;

"(9) the term 'North Pacific Council' means the North Pacific Fishery Management Council established under section 302(a)(1)(G) of the Magnuson-Stevens Act (16 U.S.C. 1852(a)(1)(G));

"(10) the term 'offshore component' means all vessels not included in the definition of 'inshore component' that process groundfish harvested in the Bering Sea and Aleutian Islands Management Area;

"(11) the term 'Secretary' means the Secretary of Commerce; and

"(12) the term 'shoreside processor' means any person or vessel that receives unprocessed fish, except catcher/processors, motherships, buying stations, restaurants, or persons receiving fish for personal consumption or bait.

. . .

"Sec. 207. Buyout.

"(a) Federal loan. Under the authority of sections 1111 and 1112 of title XI of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g [46 USCS §§ 53735 and

53702]) and notwithstanding the requirements of section 312 of the Magnuson-Stevens Act (16 U.S.C. 1861a), the Secretary shall, subject to the availability of appropriations for the cost of the direct loan, provide up to $75,000,000 through a direct loan obligation for the payments required under subsection (d).

. . .

"(d) Payments. Subject to the availability of appropriations for the cost of the direct loan under subsection (a) and funds under subsection (e), the Secretary shall pay by not later than December 31, 1998--

"(1) up to $ 90,000,000 to the owner or owners of the catcher/processors listed in paragraphs (1) through (9) of section 209, in such manner as the owner or owners, with the concurrence of the Secretary, agree . . . .

. . .

"Sec. 208. Eligible vessels and processors.

"(a) Catcher vessels onshore. Effective January 1, 2000, only catcher vessels which are--

"(1) determined by the Secretary--

"(A) to have delivered at least 250 metric tons of pollock; or

"(B) to be less than 60 feet in length overall and to have delivered at least 40 metric tons of pollock, for processing by the inshore component in the directed pollock fishery in any one of the years 1996 or 1997, or between January 1, 1998 and September 1, 1998;

"(2) eligible to harvest pollock in the directed pollock fishery under the license limitation program recommended by the North Pacific Council and approved by the Secretary; and

"(3) not listed in subsection (b),

shall be eligible to harvest the directed fishing

allowance under section 206(b)(1) pursuant to a federal fishing permit.

. . .

"Sec. 209. List of ineligible vessels.

"Effective December 31, 1998, the following vessels shall be permanently ineligible for fishery endorsements, and any claims (including relating to catch history) associated with such vessels that could qualify any owners of such vessels for any present or future limited access system permit in any fishery within the exclusive economic zone of the United States (including a vessel moratorium permit or license limitation program permit in fisheries under the authority of the North Pacific Council) are hereby extinguished:

"(1) AMERICAN EMPRESS (United States official number 942347);

"(2) PACIFIC SCOUT (United States official number 934772);

"(3) PACIFIC EXPLORER (United States official number 942592);

"(4) PACIFIC NAVIGATOR (United States official number 592204);

"(5) VICTORIA ANN (United States official number 592207);

"(6) ELIZABETH ANN (United States official number 534721);

"(7) CHRISTINA ANN (United States official number 653045);

"(8) REBECCA ANN (United States official number 592205); and

"(9) BROWNS POINT (United States official number 587440).

. . .

"Sec. 211. Protections for other fisheries; conservation measures.

"(a) General. The North Pacific Council shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by this Act or fishery cooperatives in the directed pollock fishery.

"(b) Catcher/processor restrictions.

(1) General. The restrictions in this subsection shall take effect on January 1, 1999 and shall remain in effect thereafter except that they may be superceded (with the exception of paragraph (4)) by conservation and management measures recommended after the date of the enactment of this Act by the North Pacific Council and approved by the Secretary in accordance with the Magnuson-Stevens Act.

"(2) Bering Sea fishing. The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from, in the aggregate--

"(A) exceeding the percentage of the harvest available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the total harvest by such catcher/processors and the catcher/processors listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997;

"(B) exceeding the percentage of the prohibited species available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the

total of the prohibited species harvested by such catcher/processors and the catcher/ processors listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount of prohibited species available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997; and

"(C) fishing for Atka mackerel in the eastern area of the Bering Sea and Aleutian Islands and from exceeding the following percentages of the directed harvest available in the Bering Sea and Aleutian Islands Atka mackerel fishery--

"(i) 11.5 percent in the central area; and

"(ii) 20 percent in the western area.

"(3) Bering Sea processing. The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from--

"(A) processing any of the directed fishing allowances under paragraphs (1) or (3) of section 206(b); and

"(B) processing any species of crab harvested in the Bering Sea and Aleutian Islands Management Area.

"(4) Gulf of Alaska. The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from--

"(A) harvesting any fish in the Gulf of Alaska;

"(B) processing any groundfish harvested from the portion of the exclusive economic zone off Alaska known as area 630 under the fishery management plan for Gulf of Alaska groundfish; or

"(C) processing any pollock in the Gulf of Alaska (other than as bycatch in non-pollock groundfish fisheries) or processing, in the aggregate, a total of more than 10 percent of the cod harvested from areas 610, 620, and 640 of the Gulf of Alaska under the fishery

management plan for Gulf of Alaska groundfish.

"(5) Fisheries other than North Pacific. The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) and motherships eligible under section 208(d) are hereby prohibited from harvesting fish in any fishery under the authority of any regional fishery management council established under section 302(a) of the Magnuson-Stevens Act (16 U.S.C. 1852(a)) other than the North Pacific Council, except for the Pacific whiting fishery, and from processing fish in any fishery under the authority of any such regional fishery management council other than the North Pacific Council, except in the Pacific whiting fishery, unless the catcher/processor or mothership is authorized to harvest or process fish under a fishery management plan recommended by the regional fishery management council of jurisdiction and approved by the Secretary.

"(6) Observers and scales. The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) shall--

"(A) have two observers onboard at all times while groundfish is being harvested, processed, or received from another vessel in any fishery under the authority of the North Pacific Council; and

"(B) weigh its catch on a scale onboard approved by the National Marine Fisheries Service while harvesting groundfish in fisheries under the authority of the North Pacific Council.

This paragraph shall take effect on January 1, 1999 for catcher/processors eligible under paragraphs (1) through (20) of section 208(e) that will harvest pollock allocated under section 206(a) in 1999, and shall take effect on January 1, 2000 for all other catcher/processors eligible under such paragraphs of

section 208(e).

...

"Sec. 213. Duration.

...

"(b) Existing authority. Except for the measures required by this subtitle, nothing in this subtitle shall be construed to limit the authority of the North Pacific Council or the Secretary under the Magnuson-Stevens Act.

...

Effective date of § 213(g) of Title II of Division C of Act Oct. 21, 1998, P.L. 105-277 (note to this section). Act July 24, 2001, P.L. 107-20, Title II, Ch 2, § 2202(e)(2), 115 Stat. 170, provides: "Section 213(g) of the American Fisheries Act (Public Law 105-277, division C, title II) [note to this section] shall take effect on the date of enactment of this Act."

Excerpts of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq*

§ 1851. National standards for fishery conservation and management

(a) In general

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that

no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

(b) Guidelines

The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.

§ 1852. Regional Fishery Management Councils

(h) Functions

Each Council shall, in accordance with the provisions of this chapter –

(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824(b)(4)(C) of this title or section 1824(d) of this title, and any fishery management plan or amendment transmitted to it under section 1854(c)(4) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this chapter (and for purposes of this paragraph, the term "geographical area concerned" may include an area under the authority of another Council if the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area; but not unless such other Council is first

consulted regarding the conduct of such hearings within its area);

(4) submit to the Secretary such periodic reports as the Council deems appropriate, and any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from, the capacity and extent to which United States fish processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery (except as provided in section subsection (a)(3) of this section) within its geographical area of authority;

(6) develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g) of this section;

(7) develop, in conjunction with the scientific and statistical committee, multi-year research priorities for fisheries, fisheries interactions, habitats, and other areas of research that are necessary for management purposes, that shall—

(A) establish priorities for 5-year periods;

(B) be updated as necessary; and

(C) be submitted to the Secretary and the regional

science centers of the National Marine Fisheries Service for their consideration in developing research priorities and budgets for the region of the Council; and

(8) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

§ 1853. Contents of fishery management plans

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

(A) necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b) of this section, or both; and

(C) consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign

fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify--

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational, charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated processing capacity of, and the

actual processing capacity utilized by, United States fish processors,

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the

cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for--

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority--

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot

be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to--

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 1884 of this title, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this chapter that prohibits all fishing, ensure that such closure--

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the--

(A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);

(B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and

(C) transshipment or transportation of fish or fish products under permits issued pursuant to section 1824 of this title;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

(C) the economics of the fishery;

(D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;

(F) the fair and equitable distribution of access privileges in the fishery; and

(G) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10) include, consistent with the other provisions of this chapter, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;

(12) include management measures in the plan to

conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations

Proposed regulations which the Council deems necessary or appropriate for the purposes of--

(1) implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment under section 1854 of this title; and

(2) making modifications to regulations implementing a fishery management plan or plan amendment may be submitted to the Secretary at any time after the plan or amendment is approved under section 1854 of this title.

(d) Repealed. Pub.L. 109-479, Title I, § 106(a)(1), Jan. 12, 2007, 120 Stat. 3586

1853a. Limited access privilege programs

(a) In general

After January 12, 2007, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

(b) No creation of right, title, or interest

Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this chapter--

(1) shall be considered a permit for the purposes of sections 1857, 1858, and 1859 of this title;

(2) may be revoked, limited, or modified at any time in accordance with this chapter, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;

(3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;

(4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and

(5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to

engage in activities permitted by such limited access privilege or quota share.

(c) Requirements for limited access privileges

(1) In general

Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall--

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote--

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security

interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this chapter, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-

competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

(2) Waiver

The Secretary may waive the requirement of paragraph (1)(E) if the Secretary determines that--

(A) the fishery has historically processed the fish outside of the United States; and

(B) the United States has a seafood safety equivalency agreement with the country where processing will occur.

(3) Fishing communities

(A) In general

(i) Eligibility

To be eligible to participate in a limited access privilege program to harvest fish, a fishing community shall--

(I) be located within the management area of the relevant Council;

(II) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(III) consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area; and

(IV) develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery, for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(ii) Failure to comply with plan

The Secretary shall deny or revoke limited access privileges granted under this section for any person who fails to comply with the requirements of the community sustainability plan. Any limited access privileges denied or revoked under this section may be reallocated to other eligible members of the fishing community.

(B) Participation criteria

In developing participation criteria for eligible communities under this paragraph, a Council shall consider--

(i) traditional fishing or processing practices in, and dependence on, the fishery;

(ii) the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the expected effectiveness, operational transparency, and equitability of the community sustainability plan; and

(vi) the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting or processing activities in the fishery.

(4) Regional fishery associations

(A) In general

To be eligible to participate in a limited access privilege program to harvest fish, a regional fishery association shall--

(i) be located within the management area of the relevant Council;

(ii) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(iii) be a voluntary association, among willing parties with established by-laws and operating procedures;

(iv) consist of participants in the fishery who hold quota share that are designated for use in the specific region or subregion covered by the regional fishery association, including commercial or recreational fishing, processing, fishery-dependent support businesses, or fishing communities;

(v) not be eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that is members contribute; and

(vi) develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(B) Failure to comply with plan

The Secretary shall deny or revoke limited access privileges granted under this section to any person participating in a regional fishery association who fails to comply with the requirements of the regional

fishery association plan.

(C) Participation criteria

In developing participation criteria for eligible regional fishery associations under this paragraph, a Council shall consider--

(i) traditional fishing or processing practices in, and dependence on, the fishery;

(ii) the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the administrative and fiduciary soundness of the association; and

(vi) the expected effectiveness, operational transparency, and equitability of the fishery association plan.

(5) Allocation

In developing a limited access privilege program to harvest fish a Council or the Secretary shall--

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of--

(i) current and historical harvests;

(ii) employment in the harvesting and processing sectors;

(iii) investments in, and dependence upon, the fishery; and

(iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through--

(i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and

(ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited

access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by--

(i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and

(ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges; and

(E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council.

(6) Program initiation

(A) Limitation

Except as provided in subparagraph (D), a Council may initiate a fishery management plan or amendment to establish a limited access privilege program to harvest fish on its own initiative or if the Secretary has certified an appropriate petition.

(B) Petition

A group of fishermen constituting more than 50 percent of the permit holders, or holding more than

50 percent of the allocation, in the fishery for which a limited access privilege program to harvest fish is sought, may submit a petition to the Secretary requesting that the relevant Council or Councils with authority over the fishery be authorized to initiate the development of the program. Any such petition shall clearly state the fishery to which the limited access privilege program would apply. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the limited access program shall be eligible to sign a petition for such a program and shall serve as the basis for determining the percentage described in the first sentence of this subparagraph.

(C) Certification by Secretary

Upon the receipt of any such petition, the Secretary shall review all of the signatures on the petition and, if the Secretary determines that the signatures on the petition represent more than 50 percent of the permit holders, or holders of more than 50 percent of the allocation in the fishery, as described by subparagraph (B), the Secretary shall certify the petition to the appropriate Council or Councils.

(D) New England and gulf referendum

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program,

including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2/3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council, and by a majority of those voting in the referendum among eligible permit holders with respect to the Gulf Council. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum. If an individual fishing quota program fails to be approved by the requisite number of those voting, it may be revised and submitted for approval in a subsequent referendum.

(ii) The Secretary shall conduct a referendum under this subparagraph, including notifying all persons eligible to participate in the referendum and making available to them information concerning the schedule, procedures, and eligibility requirements for the referendum process and the proposed individual fishing quota program. Within 1 year after January 12, 2007, the Secretary shall publish guidelines and procedures to determine procedures and voting eligibility requirements for referenda and to conduct such referenda in a fair and equitable manner.

(iii) The provisions of section 1883(c) of this title shall apply in lieu of this subparagraph for an individual fishing quota program for the Gulf of Mexico commercial red snapper fishery.

(iv) Chapter 35 of Title 44 (commonly known as the Paperwork Reduction Act) does not apply to the referenda conducted under this subparagraph.

(v) The Secretary shall promulgate criteria for determining whether additional fishery participants are eligible to vote in the New England referendum described in clause (i) in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum.

(vi) In this subparagraph, the term "individual fishing quota" does not include a sector allocation.

(7) Transferability

In establishing a limited access privilege program, a Council shall--

(A) establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies adopted by the Council for the fishery under paragraph (5); and

(B) establish, in coordination with the Secretary, a process for monitoring of transfers (including sales and leases) of limited access privileges.

(8) Preparation and implementation of secretarial plans

This subsection also applies to a plan prepared and

implemented by the Secretary under section 1854(c) or 1854(g) of this title.

(9) Antitrust savings clause

Nothing in this chapter shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of the preceding sentence, the term "antitrust laws" has the meaning given such term in subsection (a) of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section 45 applies to unfair methods of competition.

(d) Auction and other programs

In establishing a limited access privilege program, a Council shall consider, and may provide, if appropriate, an auction system or other program to collect royalties for the initial, or any subsequent, distribution of allocations in a limited access privilege program if--

(1) the system or program is administered in such a way that the resulting distribution of limited access privilege shares meets the program requirements of this section; and

(2) revenues generated through such a royalty program are deposited in the Limited Access System Administration Fund established by section 1855(h)(5)(B) of this title and available subject to annual appropriations.

(e) Cost recovery

In establishing a limited access privilege program, a Council shall--

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 1854(d)(2) of this title, for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

(f) Characteristics

A limited access privilege established after January 12, 2007, is a permit issued for a period of not more than 10 years that--

(1) will be renewed before the end of that period, unless it has been revoked, limited, or modified as provided in this subsection;

(2) will be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of Title 5 to have failed to comply with any term of the plan identified in the plan as cause for revocation, limitation, or modification of a permit, which may include conservation requirements established under the plan;

(3) may be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of Title 5

to have committed an act prohibited by section 1857 of this title; and

(4) may be acquired, or reacquired, by participants in the program under a mechanism established by the Council if it has been revoked, limited, or modified under paragraph (2) or (3).

(g) Limited access privilege assisted purchase program

(1) In general

A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 1854(d)(2) of this title to be used, pursuant to section 53706(a)(7) of Title 46 to issue obligations that aid in financing—

(A) the purchase of limited access privileges in that fishery by fishermen who fish from small vessels; and

(B) the first-time purchase of limited access privileges in that fishery by entry level fishermen.

(2) Eligibility criteria

A Council making a submission under paragraph (1) shall recommend criteria, consistent with the provisions of this chapter, that a fisherman must meet to qualify for guarantees under subparagraphs (A) and (B) of paragraph (1) and the portion of funds to be allocated for guarantees under each subparagraph.

(h) Effect on certain existing shares and programs

Nothing in this chapter, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation in effect before January 12, 2007.

(i) Transition rules

The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after January 12, 2007, except that--

(1) the requirements of section 1853(d) of this title in effect on the day before January 12, 2007 shall apply to any such program;

(2) the program shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation; and

(3) nothing in this subsection precludes a Council from incorporating criteria contained in this section into any such plans.

§ 1854. Action by Secretary

(a) Review of plans

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall--

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 1853(a)(6) of this title.

(3) The Secretary shall approve, disapprove, or

partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b) of this section, the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan amendment, or proposed regulation that the Council characterizes as final.

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0612242903-7445-03; I.D. 1120061]

RIN 0648-AU48

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod Allocations in the Bering Sea and Aleutian Islands Management Area

Tuesday, September 4, 2007

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement Amendment 85 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) as partially approved by NMFS, and to implement recent changes to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule modifies the current allocations of Bering Sea and Aleutian Islands management area (BSAI) Pacific cod total allowable catch (TAC) among various harvest sectors and seasonal apportionments thereof,

establishes a hierarchy for reallocating projected unharvested amounts of Pacific cod from certain sectors to other sectors, revises catcher/processor (CP) sector definitions, modifies the management of Pacific cod incidental catch that occurs in other groundfish fisheries, eliminates the Pacific cod nonspecified reserve, subdivides the annual prohibited species catch (PSC) limits currently apportioned to the Pacific cod hook-and-line gear fisheries between the catcher vessel (CV) and CP sectors, and modifies the sideboard restrictions for American Fisheries Act (AFA) CP vessels. In addition, this final rule increases the percentage of the BSAI Pacific cod TAC apportioned to the Community Development Quota (CDQ) Program. The proposed rule for Amendment 85 included regulations that would have subdivided the annual PSC limits currently apportioned to the Pacific cod trawl fisheries among trawl sectors. However, NMFS disapproved these regulations. Therefore, this final rule does not subdivide the annual PSC limits for Pacific cod trawl fisheries among trawl sectors. This final rule is necessary to implement Amendment 85 and reduce uncertainty about the availability of yearly harvests within sectors caused by reallocations and maintain stability among sectors in the BSAI Pacific cod fishery. This final rule also is necessary to partially implement recent changes to the Magnuson-Stevens Act that require a total allocation of 10.7 percent of the TAC of each directed fishery to the CDQ Program starting January 1, 2008. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Act, the FMP, and other applicable laws.

DATES: Effective January 1, 2008.

ADDRESSES: Copies of Amendment 85 and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action are available by mail from NMFS, Alaska Region, P. O. Box 21668, Juneau, AK 99802-1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; or via the Internet at the NMFS Alaska Region website at http://www.fakr.noaa.gov.

FOR FURTHER INFORMATION CONTACT: Becky Carls, 907-586-7228 or becky.carls @noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone of the BSAI under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 et seq. Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

Background

Amendment 85 was adopted by the Council in April 2006 to modify the current allocations of BSAI Pacific cod among various harvesting sectors. Currently, the BSAI Pacific cod non-CDQ TAC is fully distributed among the following eight competing harvest sectors: jig, fixed gear (pot and hook-and-line gear) CVs less than 60 ft (<18.3 m) length overall (LOA), hook-and-line CVs greater than or equal to 60 ft (≥18.3 m) LOA, hook-and-line catcher/processor vessels (CPs), pot CVs less than 60 ft (≥18.3 m) LOA, pot CPs, trawl CPs, and

trawl CVs. Several FMP amendments, implemented beginning in 1994, have allocated Pacific cod among these sectors. Additional background on the prior history of Pacific cod allocations among different fishery sectors and the development of Amendment 85 is contained in the preamble to the proposed rule (72 FR 5654; February 7, 2007).

Amendment 85 modifies the non-CDQ sector allocations currently in place to better reflect historical dependency and use by sector of the Pacific cod resource. The allocations were based in part on each sector's historical retained catch in addition to socioeconomic and community concerns. One of the fundamental issues identified in the Council's problem statement was the need to revise the existing allocations to better reflect historical retained catch by sector, thus reducing the need for frequent and significant reallocations of quota toward the end of the year from sectors that are unable or otherwise do not intend to harvest their entire allocation. However, the allocations to the small boat sectors are intended to expand entry-level, local opportunities in the BSAI Pacific cod fishery. Other than providing for this expansion, the allocations of Pacific cod non-CDQ TAC are intended to formally institutionalize the historical pattern of utilization of this resource.

Amendment 85 and the proposed rule to implement Amendment 85 as originally submitted by the Council included provisions for the CDQ Program that allocated 10 percent of the Pacific cod TAC to the CDQ Program as a directed fishing allocation, created an incidental catch allowance of Pacific cod for the CDQ Program, and referred to the Coast Guard and Maritime

Transportation Act of 2006, Public Law 109-241 (Coast Guard Act) as the basis for changes to the CDQ Program Pacific cod allocation. These provisions were consistent with requirements set forth in the Magnuson-Stevens Act, as amended by the Coast Guard Act, at the time Amendment 85 was submitted by the Council for Secretarial review. The Notice of Availability (NOA) for Amendment 85 was published in the Federal Register on December 7, 2006 (71 FR 70943), with a 60-day comment period that ended February 5, 2007.

During review by the Secretary of Commerce (Secretary) of Amendment 85, the CDQ provisions in the Magnuson-Stevens Act were amended once again by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Public Law 109-479 (Magnuson-Stevens Reauthorization Act), enacted on January 11, 2007. The Magnuson-Stevens Act now requires that allocations to the CDQ Program, including Pacific cod, increase to "a total allocation (directed and nontarget combined) of 10.7 percent effective January 1, 2008," and that the total allocation may not be exceeded. As a result of the Magnuson-Stevens Reauthorization Act, the portions of Amendment 85 to the FMP that addressed the CDQ Program provisions were no longer consistent with the Magnuson-Stevens Act. On March 7, 2007, the Secretary partially approved Amendment 85, disapproving the CDQ Program provisions as inconsistent with the Magnuson-Stevens Act. As approved, Amendment 85 revised the current BSAI Pacific cod allocations of TAC among various non-CDQ harvest sectors (Table 1), changed incidental catch allowances, removed the groundfish reserve for Pacific

cod, and added a new appendix to the FMP.

Shortly after enactment of the Magnuson-Stevens Reauthorization Act, NMFS determined that the CDQ portions of the proposed rule as submitted by the Council were inconsistent with the newly amended Magnuson-Stevens Act, and returned the rule to the Council for revision pursuant to section 304(b) of the Magnuson-Stevens Act. The Council revised the CDQ portions of the proposed rule for Amendment 85 to incorporate the changes brought about by the Magnuson-Stevens Reauthorization Act, including a 10.7-percent allocation of Pacific cod to the CDQ Program. The Council submitted the revised proposed rule to NMFS, and it was published in the Federal Register on February 7, 2007 (72 FR 5654). The 45-day comment period on the proposed rule ended March 26, 2007. NMFS received a total of 16 letters on Amendment 85 and the proposed rule that contained 79 unique comments. A summary of these comments and the responses by NMFS are provided under Response to Comments below.

Elements of the Final Rule

A detailed review of the provisions of Amendment 85 and its implementing rule is provided in the preamble to the proposed rule (72 FR 5654; February 7, 2007), and is not repeated here. The proposed rule is available via the Internet and from NMFS (see ADDRESSES). The following provides a list and brief review of the regulatory changes made by this final rule to the management of the BSAI Pacific cod fishery. NMFS' rationale for approving portions of Amendment 85 and the regulatory provisions in this final rule is contained

in the agency's response to comments.

• Increase the percentage of the BSAI Pacific cod TAC apportioned to the CDQ Program to 10.7 percent;

• Revise the allocations of BSAI Pacific cod non-CDQ TAC among various gear sectors;

• Modify the management of Pacific cod incidental catch that occurs in other groundfish fisheries;

• Eliminate the Pacific cod nonspecified reserve;

• Establish a hierarchy for the reallocation of projected unused sector allocations to other ectors;

• Adjust the seasonal allowances of Pacific cod to various sectors;

• Subdivide among sectors the annual PSC limits apportioned to the Pacific cod hook-and-line gear fisheries;

• Modify the sideboard restrictions for Pacific cod that are applied to the CP vessels listed as eligible under the AFA; and

• Revise the definition for AFA trawl CP and add definitions for hook-and-line CP, non-AFA trawl CP, and pot CP.

As described above, the Magnuson-Stevens Act now requires that 10.7 percent of the annual Pacific cod TAC be allocated to the CDQ reserve for directed and nontarget fishing combined, effective January 1, 2008.

The 10.7 percent Pacific cod allocation to the CDQ reserve will be established annually in the harvest specifications process required under § 79.20(c). The CDQ reserve will continue to be deducted from the Pacific cod TAC before the remaining Pacific cod TAC is allocated to the other fishing sectors. All catch of Pacific cod by any vessel that is groundfish CDQ fishing, and by any vessel [gteqt]60 ft (18.3 m) LOA that is halibut CDQ fishing, will continue to accrue against the CDQ group's annual allocation of Pacific cod and the CDQ groups will continue to be prohibited from exceeding their annual allocations of Pacific cod.

Nine individual non-CDQ sectors will receive separate BSAI Pacific cod allocations. The allocations to the identified sectors were selected using retained legal catch history, including fishmeal, from 1995 through 2003, and other socioeconomic and community considerations. The allocations better reflect historical dependency and use by each sector, with specific consideration to allow for additional growth in the small boat, entry-level sectors. These allocations are listed in Table 1. Because Pacific cod has been harvested by the current sectors since the beginning of 2007 under the current allocation scheme, and the number of sectors and the overall amount of Pacific cod available to those sectors as an allocation and by season will change with this amendment, the Amendment 85 sector allocations cannot be implemented mid-year. Therefore, the allocations, and the final rule implementing Amendment 85, will be effective January 1, 2008. NMFS will amend the 2007-2008 harvest specifications to reflect the changes to the Pacific cod TAC allocations.

Table 1. Percent sector allocations of Pacific cod non-CDQ TAC

Sector	% Allocation
Jig vessels	1.4
Hook-and-line/pot CV <60 ft (18.3 m) LOA	2.0
Hook-and-line CV ≥60 ft (18.3 m) LOA	0.2
Hook-and-line CP	48.7
Pot CV ≥60 ft (18.3 m) LOA	8.4
Pot CP	1.5
AFA trawl CP	2.3
(8) Non AFA trawl CP	13.4
Trawl CV	22.1

Currently, NMFS sets aside an amount of Pacific cod from some sectors' allocations as an incidental catch allowance for use by those sectors when they are directed fishing for groundfish other than Pacific cod. NMFS establishes an incidental catch allowance either through the annual harvest specifications process or inseason. Under this final rule, an incidental catch allowance for the fixed gear sectors will continue to be established at the beginning of the fishing year by the Regional Administrator during the annual harvest specifications process. The incidental catch allowance for the fixed gear sectors typically has been set at 500 mt. The trawl sectors currently do not have an incidental catch allowance established at the beginning of the fishing year. NMFS has not specified an incidental catch allowance for Pacific cod in the trawl fisheries in the recent past because the trawl sectors typically do not catch an amount of Pacific cod that would necessitate a directed fishing prohibition. Also, the seasonal apportionments to the trawl sectors have

ensured that a sufficient amount of Pacific cod is left for incidental catch in groundfish trawl fisheries other than Pacific cod later in the year. However, because NMFS anticipates that the trawl sectors will fully harvest the Pacific cod allocations under Amendment 85, NMFS also anticipates it will need to establish an incidental catch allowance for each trawl sector. Under this final rule, each trawl sector will have a separate incidental catch allowance so that no trawl sector can erode another trawl sector's total allocation and NMFS will develop incidental catch allowances for the trawl sectors on an inseason basis, rather than through the annual harvest specification process. Determining incidental catch needs inseason as fisheries progress will provide NMFS with more flexibility to adjust incidental catch needs for each trawl sector as a trawl sector's needs change.

Current regulations for the annual harvest specifications process require that 15 percent of the BSAI TAC for Pacific cod be placed in the nonspecified reserve. Half of the nonspecified reserve, or 7.5 percent of TAC, is apportioned to the groundfish CDQ reserve. NMFS typically apportions the remainder of the Pacific cod reserve back to the non-CDQ Pacific cod TAC because U.S. fishing vessels have demonstrated the capacity to catch the full TAC allocation. The Council and NMFS determined that the Pacific cod reserve is no longer needed because a direct allocation to the CDQ reserve is specified, and because the Pacific cod TAC is fully allocated among CDQ and non-CDQ harvesting sectors and is fully harvested. Therefore, this final rule removes regulations requiring that 15 percent of the Pacific cod TAC be placed in the nonspecified reserve during a fishing year.

Under current regulations, if the Regional Administrator determines that a sector will be unable to harvest the entire amount of Pacific cod allocated to that sector, NMFS reallocates the projected unused amount of Pacific cod to other sectors to obtain optimum yield from the BSAI Pacific cod fishery. This procedure will continue under this final rule, but reallocation decisions will be based in part on the new reallocation hierarchy established in this final rule, and also will take into account the capability of a sector to harvest an additional amount of Pacific cod. The reallocation hierarchy is fully described in the proposed rule and in the regulatory text below; therefore, that description is not repeated here. In general, NMFS will reallocate projected unused allocations in any inshore sector (i.e., CV sectors) primarily to other inshore sectors before reallocating that amount to any offshore sector (i.e., CP sectors) and, secondarily, within a gear type before reallocating that amount to another gear type. This reallocation hierarchy is consistent with the Council's decision to increase harvest opportunities for fleets delivering shoreside and represents a reasonable balance of National Standard 4, that allocations should be fair and equitable to all fishermen, and National Standard 8, to consider the importance of fishery resources to fishing communities. Although the intent of Amendment 85 is to revise sector allocations to better reflect historic dependence and use by sector and thus reduce the frequency and amount of inseason reallocations, the Council and the public noted that some reallocations are likely to continue.

Under existing regulations, Pacific cod allocations are further apportioned by season for most gear sectors to protect prey availability for Steller sea lions (SSLs).

The overall BSAI Pacific cod fishery is limited to seasonal percentages of TAC of no more than 70 percent between January 1 and June 10, and 30 percent between June 10 and December 31. Because this final rule modifies non-CDQ sector allocations, this final rule also modifies the seasonal allowances applicable to these sectors to maintain the overall 70/30 seasonal split for all gear types combined and to maintain, to the extent possible, the current percentage of the Pacific cod TAC harvested in the first half of the year by the non-CDQ sectors. Therefore, this final rule adjusts the seasonal allowances for each sector in response to the changes in sector allocations. This final rule also changes the jig sector seasonal allowances from 40 20 40 to 60-20-20. For the Pacific cod allocation to the CDQ Program, this final rule adds a prohibition to § 679.7(d) to clarify the current management measure that the CDQ groups are prohibited from exceeding the seasonal allowances of Pacific cod that are appropriate for the gear types that they use to catch Pacific cod CDQ. Also, the regulations regarding CDQ trawl seasonal allowances are revised to maintain the division between trawl CP and trawl CV that exists in the current regulations. The BSAI Pacific cod sector allowances for each sector, including CDQ, by season, as those seasons are specified under § 679.23(e)(5), are listed in Table 2.

Table 2. Seasonal allowances of BSAI Pacific cod expressed as a percentage of each sector=s total allocation

Gear Type	A season	B season	C season
CDQ Trawl	60%	20%	20%
CDQ Trawl CV	70%	10%	20%
CDQ Trawl CP	50%	30%	20%
Non-CDQ trawl CV	74%	11%	15%
Non-CDQ trawl CP	75%	25%	0%
CDQ Hook-and-line CP, and hook-and-line CV ≥60 ft (18.3 m) LOA	60%	40%	no C season
Non-CDQ hook-and-line CP, hook-and-line CV ≥60 ft (18.3 m) LOA, pot CP, and pot CV ≥60 ft (18.3 m) LOA	51%	49%	no C season
CDQ jig vessels	40%	20%	40%
Non-CDQ jig vessels	60%	20%	20%
All other nontrawl vessels	no seasonal allowance	no seasonal allowance	no seasonal allowance

Total non-CDQ percentage	1/1 - 6/10 = 68%	6/10 - 12/31 = 32%
Total CDQ and non-CDQ percentage	1/1 - 6/10 = 67%	6/10 - 12/31 = 33%

Any unused portion of a seasonal allowance of Pacific cod from any sector other than the jig sector will continue to be reallocated to that sector's remaining seasons during the current fishing year. The Regional Administrator will continue to reallocate any projected unused portion of a seasonal allowance of Pacific cod from the jig sector to the <60 ft (18.3 m) LOA fixed gear CV sector. Under this final rule, NMFS will reallocate a projected unused portion of the seasonal allowance for the jig sector C season on or about September 1 of each year, if possible, to provide the last rollover from the jig sector when the <60 ft (18.3 m) LOA fixed gear CV sector may still be on the fishing grounds.

The total amount of nontrawl halibut PSC for the non-CDQ fisheries currently is 833 mt of mortality. Typically, 775 mt is apportioned to the hook-and-line Pacific cod fishery and 58 mt to other nontrawl groundfish fisheries. This final rule does not change the total amount of nontrawl halibut PSC mortality allocated to the hook-and-line Pacific cod sectors or to the other nontrawl groundfish fisheries.

Currently, the annual Pacific cod hook-and-line halibut PSC allowance is apportioned among three seasons. A seasonal halibut PSC allowance in the second season has not been specified in recent years; thus, a hook-and-line directed fishery for Pacific cod has not operated in

the summer months. Halibut bycatch rates are typically high during the second season. The hook-and-line CP sector generally supports not providing a halibut PSC limit in the second season because the high halibut bycatch rates could close the directed Pacific cod fishery prior to the allocation being fully harvested. However, the hook-and-line CV sector, which is constrained by the same PSC limit, is comprised of smaller vessels with slower catch rates and a relatively small Pacific cod allocation compared to the hook-and-line CP sector. To enable the hook-and-line CVs to fish for Pacific cod in the summer months when the weather is more favorable for these smaller vessels, this final rule divides the halibut PSC allowance annually specified for the hook-and-line Pacific cod fishery between two fishery sectors: the hook-and-line CP sector and the hook-and-line CV sector (CVs >60 ft (18.3 m) LOA and CVs <60 ft (18.3 m) LOA combined). NMFS can provide varying amounts of halibut PSC by season to each sector, tailoring PSC limits to suit the needs and timing of each sector. NMFS decision to disapprove the proposed subdivision of annual PSC limits apportioned to the Pacific cod trawl gear fisheries is explained below.

Sideboards are harvesting and processing restrictions that were placed on AFA trawl CVs and AFA trawl CPs operating in the BSAI pollock fishery to protect the interests of other fishermen and processors that did not benefit directly from the AFA. This final rule removes the sideboard limits of BSAI Pacific cod for the AFA trawl CPs. The establishment of a separate Pacific cod allocation to this sector negates the need for the BSAI Pacific cod sideboard which protects the historic share of the non-AFA trawl CP sector from

being eroded by the AFA trawl CP vessels. For the same reason, BSAI Pacific cod is added to the list of exceptions to the groundfish species or species groups for which sideboard harvest limits are calculated for the listed AFA trawl CPs. The halibut and crab PSC sideboard limits for both AFA sectors are maintained as currently specified in regulations.

This final rule modifies or adds definitions for CPs in accordance with the Consolidated Appropriations Act, 2005 (Public Law 108-447). This final rule revises the definition for AFA trawl CP and adds new definitions for hook-and-line CP, non-AFA trawl CP (also known as the head-and-gut sector), and pot CP. The new definition for hook-and-line CP is substantively consistent with the Consolidated Appropriations Act's definition for the longline CP subsector. Also, the definition for "CDQ reserve" is revised to change and update terms and to generalize the cross reference. All of the various housekeeping revisions described in the proposed rule also are made by this final rule.

Element of the Proposed Rule Not Approved

NMFS did not approve one regulatory change recommended by the Council and included in the proposed rule. For reasons explained below, NMFS did not approve the Council's recommendation to further apportion the Pacific cod trawl fishery crab and halibut PSC allowances among the trawl sectors.

PSC regulations pertain to certain species caught in the process of fishing for groundfish that must be accounted for, but cannot be retained unless the vessel participates in the halibut and salmon donation

program at § 679.26. Regulations at § 679.21 establish PSC limits for Pacific halibut, three species of crab, salmon, and herring in the BSAI trawl groundfish fisheries, and a separate Pacific halibut PSC limit for nontrawl gear. These regulations also establish allocations of each PSC limit between the CDQ and non-CDQ fisheries and a process for apportioning PSC among non-CDQ fisheries.

Currently, the total amount of halibut PSC mortality for trawl gear in the non-CDQ fisheries is apportioned in the annual harvest specifications process among four fisheries, including the Pacific cod fishery. The current process of fishery apportionment will continue under this final rule. Generally, about 1,400 mt of halibut PSC mortality is apportioned annually to the BSAI Pacific cod trawl fishery, but this amount and actual use can vary from year to year. Crab PSC limits fluctuate as resource abundance fluctuates.

In recent years, the trawl CV and trawl CP sectors' directed Pacific cod fisheries have closed most often (1) due to reaching the seasonal TAC, (2) to avoid exceeding specified halibut PSC allowances, or (3) because a fishing season has ended. Reaching a crab PSC limit results in closure of a specific area to directed fishing. Unlike reaching a halibut PSC limit, reaching a crab PSC limit typically does not close BSAI Pacific cod trawl fisheries, although occasional crab PSC closures have occurred in the past.

The Council recommended that the amount of halibut and crab PSC that would be apportioned to each trawl sector for the Pacific cod trawl fishery under this action be proportional to each sector's percentage of Pacific

cod harvested in the Pacific cod target fishery from 1999 through 2003, including Pacific cod retained for meal production. Accordingly, the proposed rule divided the annual PSC allowance of halibut and crab specified for the Pacific cod trawl fishery category among the trawl sectors as follows: 70.7 percent for trawl CVs; 4.4 percent for AFA trawl CPs; and 24.9 percent for non-AFA trawl CPs. Because the AFA and non-AFA trawl CVs would share a Pacific cod allocation, the Council decided that this sector also should receive combined halibut and crab PSC allowances.

The Council intended the apportionment of halibut and crab PSC among the trawl gear sectors that target Pacific cod to allow each sector to better plan its operations by being able to manage its PSC use during the fishing year without its PSC being eroded by another sector. Because the Council's apportionment of halibut and crab PSC was proportional to a trawl sector's harvest of Pacific cod in a target fishery, those sectors that harvested Pacific cod primarily as a target species, rather than as a species caught incidentally in other groundfish fisheries, would have received proportionally higher PSC allowances. Under this apportionment, the trawl CV and AFA trawl CP sectors would have received higher PSC allowances than they have historically used or needed, and the non-AFA trawl CP sector would have received significantly less PSC than it has historically used or needed to optimize groundfish harvest under current PSC limits.

During its deliberation on adoption of Amendment 85, the Council understood and acknowledged that the percentage of halibut and crab PSC apportioned to the

non-AFA trawl CP sector could be constraining compared to average historic use, but chose not to modify its decision. The Council determined that the amount of PSC that would be apportioned to the non-AFA trawl CP sector would fall within the range of what this sector has caught historically.

Under the Council's recommendation and the proposed rule, the non-AFA trawl CP sector would have received 22 percent less halibut PSC and 37 percent less Zone 1 bairdi (*Chionoecetes bairdi*) crab PSC than it has used historically to prosecute its directed Pacific cod fishery and only about the average amount of opilio (*Chionoecetes opilio*) crab PSC. Conversely, the AFA trawl CP and the trawl CV sectors would have received about 200 percent and 40 percent more halibut PSC, 19 percent and 116 percent more bairdi crab PSC, and 3,144 percent and 20,904 percent more opilio crab PSC, respectively, than these sectors have used historically.

Regulations implementing the FMP must be consistent with the Magnuson-Stevens Act, including the national standards, and other applicable law. NMFS determined that further apportionment of halibut and crab PSC among Pacific cod trawl sectors as proposed by the Council is inconsistent with National Standards 1, 4, and 9 of the Magnuson-Stevens Act. National Standard 1 requires that fishery management measures prevent overfishing while maintaining optimum yield from each fishery, National Standard 4 requires allocations to be fair and equitable among affected fishermen, and National Standard 9 requires that bycatch and the mortality of any bycatch be minimized to the extent practicable. Under the existing open access management of the non-AFA Pacific cod trawl fishery,

NMFS determined that the non-AFA trawl CP sector is unlikely to be able to harvest its entire allocation of Pacific cod with the significant reductions in the proposed amount of halibut and crab PSC as detailed above. This would result in a de facto reduction in the non-AFA trawl CP Pacific cod allocation and would likely reduce this sector's ability to harvest other targeted species. The Council did not provide any explanation as to why an additional reduction in this sector's harvest of Pacific cod and other target species not the subject of this final rule is appropriate or consistent with National Standard 4 or other applicable law. Additionally, because the amount of PSC allocated to the AFA trawl CP and the trawl CV sectors is so much greater than their historical needs, the proposed PSC allocations to these sectors may create a disincentive for these sectors to minimize their bycatch of prohibited species, which is not consistent with National Standard 9. Finally, because the non-AFA trawl CP sector harvests a significant majority of species other than pollock and Pacific cod, an inconsistency with National Standard 1 exists. The non-AFA trawl CP sector would likely not have PSC remaining from its Pacific cod fishery that could then be used to achieve optimum yield from its other BSAI groundfish fisheries.

Based on the reasons discussed above, therefore, NMFS disapproved the apportionment of the annual PSC allowances of halibut and crab mortality among the Pacific cod trawl gear sectors. Regulations pertaining to this element are not included in this final rule. These apportionments will continue to be specified during the annual harvest specifications process.

NMFS notes that a separate amendment to the FMP, Amendment 80, was approved by the Secretary on July 26, 2007. Amendment 80 primarily allocates several BSAI non-pollock trawl groundfish fisheries, halibut PSC, and crab PSC among fishing sectors, and facilitates the formation of harvesting cooperatives in the non-AFA trawl CP sector. The proposed rule to implement Amendment 80 was published in the Federal Register on May 30, 2007 (72 FR 30052) and was available for public comment until June 29, 2007.

Changes in Regulations from the Proposed Rule to the Final Rule

NMFS made several changes to the proposed regulatory text in this final rule. First, NMFS has removed proposed § 679.21(e)(3)(v) from the final rule. Proposed § 679.21(e)(3)(v) included the proposed PSC allowances for the trawl sector which NMFS disapproved for the reasons explained above. Proposed § 679.21(e)(3)(vi) reverts back to § 679.21(e)(3)(v) in this final rule as a result of removing proposed § 679.21(e)(3)(v). NMFS also has removed references to proposed § 679.21(e)(3)(v) from the final rule.

Second, the proposed regulatory text at § 679.20(a)(7)(i)(B)(1) regarding CDQ seasonal allowances combined all CDQ trawl vessels into one group. This final rule revises the proposed regulatory text to maintain the division between trawl CP and trawl CV that exists in the current regulations. No changes to the CDQ Program seasonal allowances were intended by the Council.

Last, the proposed regulatory text at §

679.20(a)(7)(iii)(B) inadvertently included the heading "trawl catcher/processor sectors." This heading is changed in this final rule to "trawl gear sectors" because this part of the reallocation hierarchy applies to all trawl gear sectors, not just the trawl CP sectors.

Response to Comments

As mentioned above, NMFS received 16 letters containing 79 unique comments during the public comment periods. Two non-industry letters were received and 14 letters were received from the fishing industry. A summary of those comments, grouped by subject matter, and NMFS' responses follow.

Comment on the Intent of Amendment 85

Comment 1: One commenter supports the intent of Amendment 85 to modify the allocations of Pacific cod by codifying the fishery as it is actually occurring with the goal of reducing inseason adjustments (reallocations) from the trawl sectors to the hook-and-line sectors. Another commenter supports the intent of Amendment 85 to modify the allocations of Pacific cod to various sectors to better reflect historic usage.

Response: NMFS notes the support for Amendment 85 and clarifies that one intention of this action is to better reflect historic use, not current use, as noted in this excerpt from the Council's problem statement: "To reduce uncertainty and provide stability, allocations should be adjusted to better reflect historic use by sector. The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors."

Comments on Data Used

Comment 2: The catch history information used in Amendment 85 was based on the best scientific information available (1995-2003 WPR (Weekly Production Report) and fish ticket data for retained catch). Preliminary data from 2004 and 2005 were also considered. It is appropriate to use WPR data to calculate catch history by sector for the CPs because it is the only data set common to all CP vessels. The use of WPR data was well noticed to the public. The non-inclusion of fishmeal was consistent with all previous Council actions involving allocation.

Response: NMFS agrees that the catch history information used to develop Amendment 85 and presented in the proposed rule was based on the best scientific information available, consistent with National Standard 2 of the Magnuson-Stevens Act. Only legally retained catch was used in determining harvest history to avoid rewarding sectors with a high discard rate of Pacific cod. However, data presented in the EA/RIR/initial regulatory flexibility analysis (IRFA) and considered by NMFS in its decision to approve the non-CDQ allocations in Amendment 85 did include cod destined for fishmeal production because it is legally retained catch. The analysis used data from Federal WPRs, which include fishmeal data, and the Alaska Department of Fish and Game (ADF&G) fish tickets to calculate sector specific harvest history. These databases were used because they are consistent across all sectors and every sector's production of Pacific cod is weighed and reported on WPRs and/or fish tickets.

Total harvest was calculated based on retained legal harvest (including Pacific cod that was turned into fishmeal as the primary product) from WPRs and ADF&G fish tickets. In addition, total harvest (retained and discarded cod, including fishmeal) from NMFS blend data, and the catch accounting database was provided in Section 3.3.5 (Table 3-24) of the analysis. The NMFS blend data and data from the catch accounting database (used since 2003) utilize observer data, shoreside processor landings data, and fish tickets. In the cod target fishery, blend data are calculated from partial haul samples, including discards. Observer estimates are extrapolated for some sectors because of varying levels of observer coverage. Because the AFA trawl CP sector is 100 percent observed, the best information available for that sector would be the blend data. However, not all sectors would be treated equally if blend data were used because not all sectors are 100 percent observed. Therefore, the decision by NMFS to use WPR data and ADF&G fish tickets, and to include cod destined for fishmeal in the determination of harvest history is fair and equitable, and is consistent with National Standards 2 and 4 of the Magnuson-Stevens Act.

Comment 3: The range of dates selected seriously over-weighted the pre-Amendment 46 period, an inept historical analogue to the current fishery and a period of time for which Amendment 85 was explicitly designed to supersede in order to better reflect current use and dependence. The express purpose of Amendment 85 is to conform allocations to existing realities. The years most relevant to existing realities are the most recent years and the Council failed to consider those years.

Current allocations are based on historical usage prior to 1997, and the Council's problem statement seeks to address the fact that "the current allocations do not correspond with actual dependency and use by sectors."Allocations set in 1997 closely tracked actual usage at that time to determine what are now the current allocations. Therefore, any history prior to 1997 should not be used because it is different from the "actual use" which Amendment 85 is intended to reflect.

Beginning in 1998, Pacific cod had to be retained by all vessels as long as directed fishing was open; no sector should be penalized for discarded fish that were legally discarded prior to that. Comparing sectors that only target cod with sectors that both target and have incidental catches of cod is not comparing apples to apples. The Council considered data that contained only retained catch, so they understate the amount of Pacific cod the non-AFA trawl CPs needed to prosecute other fisheries in the years prior to 1998. Under the current regulatory scheme that fish would be retained and counted.

In 1999, the AFA identified a number of AFA vessels and granted them exclusive access to BSAI pollock. The non-AFA trawl CPs were excluded from targeting pollock and increased their harvest share of Pacific cod. All but one of the AFA trawl CPs ceased to target Pacific cod.

Rewarding one sector over the other for legal discard activity from 10 years prior to final Council action does not correspond to dependencies developed in light of the current management era, which began with a new

cod allocation in 1997, 100 percent mandatory retention in 1998, and the AFA in 1999 which preempted the head-and-gut (H&G) fleet from the largest groundfish fishery in North America. Therefore, earlier years do not indicate "present participation" or "actual use."

Response: As stated in the response to Comment 1, the allocations established by Amendment 85 and this final rule are intended to better reflect a sector's historic use, not current use. In referencing the Council's problem statement, the commenter appears to equate "actual" with current, but this is not what the Council meant by "actual." The problem statement also states, "The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors."One year or just a few recent years is not reflective of catch history and dependence over time. No one year in the history from 1995 to 2003 was given more weight than any other.

The Council had several options available in setting the allocation percentages, including the harvest histories from several specific set of years, and an option to select direct allocation percentages from within the range of analyzed percentages. The Council chose to select allocations for the non CDQ sectors that were within the range of analyzed percentages, and that more closely represent an average of retained catch for most sectors from 1995 through 2003.

Harvest history for each sector was based on annual retained catch. The data presented in the EA/RIR/FRFA include historic harvest from 1995 through 2003 as the primary bases for determining historic use of Pacific cod by sector, although data from

2004 to 2005 are provided as well. The starting year of 1995 was chosen because it includes data from the early years of sector allocations of Pacific cod TAC that began in 1994 with the implementation of BSAI Amendment 24 to the FMP (59 FR 4009, January 28, 1994). This set of years also includes changes in Pacific cod harvest due to impacts beginning in 1998 from implementation of improved retention/improved utilization measures to reduce discards, from AFA legislation in 1999, and from Steller sea lion protection measures beginning in 2001, all of which had impacts on all sectors to varying degrees. Pacific cod has been a valuable species for a long time, therefore, it is important to also consider the time period before these major legislative and regulatory programs to determine historic dependence and use. Also, consideration of just three or four recent years does not show dependency by the sectors over time and may be unduly biased because of increased market demand for Pacific cod in recent years for some products, potential decreased participation due to BSAI crab rationalization, and the likelihood of competition for Pacific cod among sectors in anticipation of this action.

At the time the Amendment 85 analysis was initiated by the Council in late 2004, the data from 2003 were the most recent available. Rather than continually adding years as the action progressed, the data analyzed for the allocation options stopped with the data from 2003. The Council and NMFS considered more recent (2004 and 2005) harvest data from the NMFS catch accounting database in reviewing harvest history to illustrate recent harvest trends as that information became available, but it was not available in the same format as the data from 1995 through 2003. However,

for the reasons stated above, this two-year data set was not used as the sole basis for the allocations. Additionally, the data showed that some sectors increased their harvest of Pacific cod during the recent past, compared to their 1995 through 2003 harvest, and were not constrained by their allocation in doing so because they did not harvest their entire allocation. Not all sectors had the advantage of such flexibility. Therefore, based upon all these reasons, focusing on more recent years does not provide an equitable standard upon which to assess the dependence of Pacific cod by all sectors. The use of data from 1995 through 2003 provides a more appropriate basis to determine historic harvest share.

In 1994 under Amendment 24, the trawl sectors were allocated 54 percent of the Pacific cod TAC, the fixed gear sectors received 44 percent, and the jig gear sector received 2 percent. This allocation was approximately equal to the average percent of Pacific cod taken with trawl gear or fixed gear between 1991 and 1993. In 1997 under Amendment 46, the allocation to the trawl sector was reduced to 47 percent and then equally divided between trawl CPs and trawl CVs. The reduced allocation to the trawl sector was determined by an industry negotiating committee and closely represented the harvest percentages taken by trawl and fixed gear at that time while retaining the 2-percent allocation for jig gear. The split between trawl CVs and trawl CPs was agreed upon by a separate negotiation between representatives of the trawl sectors to maintain a directed fishery for trawl CVs which were more dependent on directed fishing for Pacific cod. These basic trawl and fixed gear percentage allocations of Pacific cod TAC have remained unchanged since 1997.

The fixed gear sectors were divided in 2000 and the pot sectors in 2004, but the overall split between trawl and fixed gear sectors and between trawl CPs and trawl CVs did not change.

The high discard rates of Pacific cod is an issue that the Council has been addressing for some time. The problem statement for Amendment 46 states: "Management measures are needed to ensure that the Pacific cod TAC is harvested in a manner which reduces discards in the target fisheries, reduces PSC mortality, reduces nontarget bycatch of Pacific cod and other groundfish species, takes into account the social and economic aspects of variable allocations and addresses impacts of the fishery on habitat."

The Council's intent under Amendment 85 was to calculate historic catch by using retained harvest of Pacific cod, because Pacific cod is required to be retained (in both the directed fishery, and up to the maximum retainable allowance when the directed Pacific cod fishery is closed) and it was not the intent to "reward" sectors that have higher discards of Pacific cod. This is why discarded Pacific cod was not included in the harvest history data. All of the harvest data provided were considered in the allocation decision by the Council and by NMFS. Most sectors have incidental catch of Pacific cod in their fisheries. The exceptions are the jig and pot gear sectors. By using historic catch over the same set of years and using the same data set for all sectors (see response to Comment 2), all sectors were treated fairly and equitably, consistent with National Standard 4 of the Magnuson-Stevens Act.

Comment 4: The use of WPRs to calculate the round

weight of cod harvested by the AFA trawl CP sector for the years after 1998 is a significant source of error in the catch history tables set forth in the draft analysis. The use of observer reports and scale weights is universally recognized as a more accurate way of calculating a vessel's total catch than the somewhat antiquated WPR approach. The use of WPR data as a basis for the AFA trawl CP catch history is inconsistent with the requirement that management measures be based on "the best scientific evidence available." The draft analysis should be revised to clarify that observer data (not WPRs) represent the best available data for the post-1998 catch history of the AFA trawl CP sector.

Response: The Council's and NMFS' use of WPR data rather than NMFS blend data and the catch accounting database, which both use observer data as one component, is explained in the response to Comment 2. WPR data and blend data estimate catch using different methods. WPR data represents a consistent database across all sectors; every sector's product is weighed, and landed weights are converted to round weights. The blend data estimate catch based on vessel catch reports augmented by observer data, and are used for in-season management. The blend data use observer estimates of discards, which affect the total catch estimates. In the cod target fishery, observer estimates are based primarily on partial haul sampling. In general, CPs <125 ft (38.1 m) LOA are observed 30 percent of the time, and blend data use WPR data when there are no observer data available. Finally, during the years considered to establish allocations (1995 2003), the more accurate flow scales were used more extensively in the AFA CP sector than in other sectors.

Because the AFA trawl CP sector is 100 percent observed, the best information available for that sector would be the blend data. However, blend data are not available by vessel length for the CV sectors, which primarily affects the <60 ft (18.3 m) fixed gear CVs. Also, the non-AFA trawl CPs <125 ft (38.1 m) LOA are observed 30 percent of the time, so WPR data are used when there are no observer data available. These two datasets rely on different estimation methods and do not provide identical estimates of catch by sector. Use of blend data for some sectors and WPR data for other sectors would be problematic because any estimation error among sectors could be exacerbated if different datasets are used to determine sector specific allocations. Therefore, the best available data when comparing Pacific cod harvests among all sectors for the determination of harvest history is WPR data and ADF&G fish tickets (see response to Comment 2). Acknowledging that observer data are used to monitor catch for this one sector because it is 100 percent observed would not change the decision on the amendment. Therefore, no changes will be made to the analysis concerning this subject.

Comment 5: The data used in the draft analysis excludes Pacific cod utilized in the production of meal from the AFA trawl CP's catch history. It is inappropriate for the draft analysis to exclude or otherwise discount Pacific cod used for meal production from any of the tables used to depict catch history for the AFA trawl CP sector. There is no justification for excluding the official catch data from an analysis that purportedly reflects the catch history of this sector. The combined effect of using WPR-based catch accounting to calculate the AFA trawl CP catch history

and excluding the catch used to make meal results in an inaccurate estimate of the sector's catch history that understates the AFA trawl CP sector's historic use and dependency on cod. The draft analysis should be revised to clarify that meal is a "legally retainable product" insofar as that term is used in connection with Amendment 85 and other regulations governing the BSAI groundfish fishery; and that all legally retained cod taken as bycatch in the directed pollock fishery will be included in the AFA trawl CP sector's catch history for purposes of Amendment 85.

Response: The concern about fishmeal not being included in calculations of harvest history was a result of some commenters relying on a draft analysis distributed prior to the April 2006 Council meeting. As explained in the response to Comment 2, WPR data represent the best available information for comparing Pacific cod catch across and among sectors. WPR data include Pacific cod destined for fishmeal. However, in the early development of the Amendment 85 analysis, data for Pacific cod destined for fishmeal were removed from the WPR data and Council analytical documents up to the April 2006 Council meeting continued to exclude fishmeal data. At the April 2006 Council meeting, in light of public comment, WPR data that included fishmeal data was provided for Council consideration. As explained in response to Comment 2, the history considered in setting non-CDQ allocation percentages in Amendment 85 included Pacific cod that was turned into fishmeal as the primary product. Several tables that incorporated fishmeal in the harvest history were presented to the Council in April 2006 for its consideration and similar tables were included in the Secretarial review draft analysis issued in January

2007. The analysis was not revised in light of this comment because the data on fishmeal were considered and included in setting the Pacific cod allocation to the AFA trawl CP sector and the historic catch data including fishmeal are presented in the analysis.

Comment 6: The H&G sector allocation of 13.4 percent is 0.2 percent less than the sector's straight 95-03 average. The action was taken in 2006, however the last year considered was 2003. This sector's "historic use" and "actual dependency" are not adequately reflected if 2004 and 2005 are not taken into consideration for a final action taken in 2006. The Magnuson-Stevens Act instructs that recency must be considered as well. By allocating the H&G sector an amount of cod less than its average harvest for the historical period of 1995 to 2003, the Council simply ignored the present participation consideration.

Response: NMFS disagrees that the non-AFA trawl CP sector was allocated an amount of Pacific cod that is less than its average historic harvest for the period 1995 to 2003 (average historic harvest). NMFS believes that the commenter's reference to 13.6 percent is likely based on data in the analysis that excludes fishmeal in the calculation of average sector harvest share (see Table 3-11 in the EA/RIR/FRFA). The Council and NMFS included fishmeal in determining historic harvest. When fishmeal is included in the calculation, the head-and-gut (non-AFA trawl CP) sector average historic harvest from 1995 to 2003 is 13.4 percent. The non-AFA trawl CP sector received exactly its 1995 to 2003 average historic harvest as its allocation under Amendment 85. The Council and NMFS also considered more recent participation in 2004 and 2005, but for

reasons provided in the response to Comment 3, chose not to include more recent participation in determining historic use and dependence.

Comment 7: The draft analysis should be revised to include at least one table (based on official catch data and including fish utilized in meal production) that clearly shows the total retained catch of cod by the AFA trawl CP sector during the period following adoption of the AFA (e.g., the years 1999-2003).

Response: Appendix G of the analysis prepared for Amendment 85 and this rulemaking (see ADDRESSES) includes Pacific cod catch data, including fishmeal, for the AFA trawl CP sector for the years 1995 through 2003. Therefore, NMFS does not need to revise the analysis to include this table.

Comment 8: Neither the EA/RIR/IRFA before the Council nor the Secretarial draft had simply one table which showed the complete picture of each sectors' history. It takes three tables to complete the 1995-2005 picture.

Response: Table 3-24 in the Secretarial review draft of the EA/RIR/IRFA gives the data for BSAI Pacific cod non-CDQ allocations, catch and reallocations by sector from 1995 through 2005. The proposed rule purposely used two tables and the Secretarial review draft analysis used three to present the historical catch data as the average share of the retained Pacific cod harvest over various time periods. Table 3-9 in the EA/RIR/IRFA was used to show the complete picture of each sector's history for the years under consideration for allocations (1995 - 2003), and Table 3-

12 shows the catch history for 2004 and 2005 in a two-part table. The data from 1995 through 2003 used in Table 3 in the proposed rule were from a different source than the data for 2004 and 2005 used in Table 4. Separate tables were used to help draw attention to this fact in the proposed rule and for the same reason in the EA/RIR/FRFA.

Comment 9: The proposed allocation to the H&G sector cannot be justified by the fact that the H&G sector had a lower harvest share in 1995-1998, nine to twelve years ago and prior to the implementation of several significant regulatory changes culminating in the AFA that fundamentally changed the dynamics of the fishery, and that as a result its "average historical" retained catch was 13.4 percent. The sector's performance in those earlier years is of no relevance to the goal that the Council was seeking to achieve.

Response: NMFS disagrees. The reasons why data from 1995 through 1998 are included in the calculation of average historic harvest are explained in the response to Comment 3. While the data may represent a period of time when the non-AFA trawl CP sector was not maximizing its retained harvest of Pacific cod, it does represent a period of time when other sectors were maximizing their harvest. The Council's goal was to adjust allocations "to better reflect historic use by sector."NMFS determined that the years selected by the Council are consistent with that goal.

Comment 10: The Council was not required to use one particular set of "correct" years in conforming the allocations to existing reality, but the allocation to the non-AFA trawl CP sector was clearly beyond any

rational assessment of "actual use." Within the range of options presented to the Council in the Amendment 85 document (April draft), the period from 2000 to 2003 clearly was most reflective of actual current participation in the fishery. Under that approach, the non-AFA trawl CP sector averaged 16.2 percent. At the other extreme, under the option least reflective of actual current participation, from 1995 to 2002, the non-AFA trawl CP sector average 13.2 percent. Incredibly, the Council chose to allocate an even smaller share to the non-AFA trawl CP sector than the 1995-2003 average of 13.6 percent. The Council's proposal of 13.4 percent does not reflect the non-AFA trawl CP sector's current or even its relevant recent participation in this fishery. This reduction was not part of an across-the-board cut that treated all sectors equitably. Some sectors received an increase above their actual use and the non-AFA trawl CP sector received the largest decrease.

Response: See the response to Comment 3 for a discussion of the years considered to determine average historic harvest. The non-AFA trawl CP sector catch history from 1995 through 2003 is 13.6 percent only if fishmeal is not included. However, the Council's allocation recommendation included Pacific cod that was turned into fishmeal as the primary product when developing the Pacific cod sector allocations because Pacific cod destined for fishmeal production is legally retained catch (see response to Comment 2). Table 3-119 of the EA/RIR/FRFA shows that when fishmeal is included in the calculation, which the Council did in taking final action, the non-AFA trawl CP sector's average from 1995 through 2003 matches exactly the new allocation: 13.4 percent of the non-CDQ Pacific cod

TAC. Some sectors received allocations that are greater than their historic harvest during 1995 through 2003 and others less, but the non-AFA trawl CP sector was the only sector to receive exactly its average share of the retained harvest from 1995 through 2003.

Comment 11: Comparing the harvest information from 2004 and 2005 with the Amendment 85 allocations reveals that the non-AFA trawl CP sector suffered nearly an order of magnitude loss greater than any other sector (most of which received allocations at or above their 2004-2005 average). Comparing the Amendment 85 allocation to the average of 1998-2003 (a range from when cod became a 100-percent retention species to the last year of data the Council had when making their decision), the non-AFA trawl CP fleet still lost far more than any other sector going from an average of 15.7 percent to 13.4 percent (relative loss of 14.5 percent).

Response: The Council had harvest data from 2004 and 2005 available when it took final action on Amendment 85. It was not available in the same format as the years from 1995 through 2003, but it was considered by the Council. The non-AFA trawl CP sector allocation is exactly its catch history from 1995 through 2003. As stated previously (see responses to Comments 2 and 3), the Council chose to look at history and dependency over a number of years, not just one or two recent years. Although the non-AFA trawl CP sector's retention of Pacific cod has increased over the last several years, that sector always had the opportunity to retain Pacific cod in higher amounts than they historically did. For various reasons, the sector chose to focus on other species as a business decision. The

Council determined that the new allocations were needed to better reflect historic use and chose not to define historic use as just the last two or three years.

Comments on Allocation Issues

Comment 12: The increase in allocation percentage to fixed gear from trawl gear is consistent with the historic trend in the way the BSAI cod fishery is prosecuted as well as with previous Council actions regarding BSAI cod allocations in Amendments 24 and 46. Stabilizing the increased historic proportion of fixed gear harvest via allocation of BSAI Pacific cod in Amendment 85 will ensure the continued experience of reduced halibut and crab bycatch, improved product quality, and reduced benthic impacts associated with fixed gear cod fisheries as compared to trawl cod fisheries.

Response: Amendment 85 is intended to better reflect historic usage by the various harvest sectors while addressing coastal community needs. The Pacific cod allocations to the trawl and fixed gear sectors set in 1994 under Amendment 24 (54 percent and 44 percent, respectively), were approximately equal to the average percentage of Pacific cod taken with these gear types during 1991 through 1993, with a 2-percent allocation for jig gear. The Pacific cod allocations set in 1996 under Amendment 46 were arrived at by industry negotiation and were chosen to represent more closely the harvest percentage taken by trawl and fixed gear sectors at that time (47 percent and 51 percent, respectively), while maintaining the 2-percent allocation for jig gear. Under Amendment 85, if the harvest sectors were similarly grouped, the allocations

would be 37.8 percent for trawl gear, 60.8 percent for fixed gear, and 1.4 percent for jig gear. NMFS has determined that the sector allocations proposed under Amendment 85 better reflect the historic use by the various harvest sectors as a whole than do the current sector allocations, and has approved them. NMFS notes the second comment.

Comment 13: All sectors received amounts that reflect recent participation, except the AFA CPs which received more, and the small boat fleets which also received much more than their history, as a policy decision. Only the H&G fleet has suffered a set back so large that both its directed fishery and its non-cod directed fisheries are jeopardized, while the other sectors' annual fish plans were not affected.

Response: NMFS approved the non-CDQ sector allocation percentages in Amendment 85. The following is NMFS' rationale for that decision. Amendment 85 will separate trawl CPs into two sectors, AFA and non-AFA, for purposes of Pacific cod allocations. The AFA trawl CP fleet will be restricted to a separate allocation slightly greater than its historic catch from 1995 through 2003, but 62.3 percent below its current sideboard limit for catch of Pacific cod. Separating the two sectors will protect the historic catch of the non-AFA trawl CPs better than leaving these two sectors combined with a lower shared allocation that reflects their combined history, but with the same AFA sideboard limit. Although the AFA trawl CP sector decreased its average harvest share between 2000 and 2003, this fleet is a cooperative that more likely will catch its Pacific cod allocation in a manner that minimizes the bycatch of non-target species. Bycatch is

a consideration under National Standards 4, 5, and 9 of the Magnuson-Stevens Act. Because the allocation to the AFA trawl CP sector is slightly higher than this sector's historic catch, it should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery, in addition to meeting its needs for incidental catch in its pollock and yellowfin sole fisheries. This ability to maintain the opportunity for these few directed fisheries is important because AFA sideboard provisions restrict this sector's ability to participate in other BSAI fisheries and AFA trawl CPs are prohibited from fishing in the Gulf of Alaska.

Only the non-AFA trawl CP sector will receive an allocation equal to its exact average historic harvest share from 1995 through 2003. The allocation to this sector is reflective of its dependence on the Pacific cod fishery over many years. About half of its historic Pacific cod harvest occurs as incidental catch in flatfish (primarily yellowfin sole and rock sole), Atka mackerel, and rockfish fisheries. The BSAI flatfish fisheries are the primary revenue source for this sector and often incur high incidental catches of Pacific cod. Note that the trawl CP sectors combined have contributed 49.1 percent on average to the total annual reallocations of Pacific cod to other non-trawl sectors between 2000 and 2004. Based on environmental considerations, the nature of these sectors' fisheries, average historic harvest, and to protect the non-AFA trawl CP harvest, NMFS determined that the allocations under Amendment 85 to the trawl CP sectors are a reasonable balance of the National Standards under the Magnuson Act.

The hook-and-line CV <60 ft (18.3 m) LOA sector will

receive an allocation above its average historic harvest, and this allocation will no longer be shared with the hook-and-line CV <60 ft (18.3 m) LOA sector. This will allow Pacific cod to remain open to directed fishing for a longer period of time. Existing regulations governing bycatch require that all Pacific cod be retained when directed fishing is open. Thus, discard of Pacific cod by the hook-and-line CV ≥60 ft (18.3 m) LOA sector should be reduced when targeting other species, particularly Pacific halibut, and to a lesser extent in its sablefish and rockfish fisheries, an important consideration under National Standards 4, 5, and 9.

The allocations are not based solely on historic harvest share, but also are based on socioeconomic considerations, consistent with National Standard 8. For this reason, the allocations are higher than the average historic harvest for the jig sector and the fixed gear CV <60 ft (18.3 m) LOA sector. Under National Standard 8, NMFS must take into account the importance of fishery resources to fishing communities to provide for the sustained participation of such communities. By maintaining allocations above the average harvest history for these two entry level sectors, Amendment 85 maintains and expands local opportunities for resident fishermen in small, coastal communities near the fishing grounds to participate in the BSAI Pacific cod fishery.

The increase in the allocation to the fixed gear CV <60 ft (18.3 m) LOA sector from 0.7 to 2.0 percent of the non-CDQ Pacific cod TAC is fair and equitable. This sector has been successfully harvesting part of the allocation to the general hook-and line CV and pot CV allocations, all of its allocation since 2002, and

reallocations from the jig sector since 2004. Its share of the harvest in 2004 and 2005 averaged 1.7 percent. The small CV sectors have been favored in previous allocation measures for BSAI Pacific cod to encourage growth in this entry level sector. Such actions have been successful as illustrated by the steadily increasing harvests by this small boat sector. The allocation of 2.0 percent to the fixed gear CV <60 ft (18.3 m) LOA sector is necessary to provide sufficient Pacific cod for this sector to harvest under its own direct allocation, separate from the hook-and-line and pot CV [gteqt]60 ft (18.3 m) LOA sector allocations these small boats currently may fish under, and to allow continued growth in this small boat sector.

Although the jig sector allocation of 1.4 percent of the Pacific cod TAC is 14 times higher than its historic harvest share, it is a reduction from it current allocation of 2.0 percent. The intent of this allocation is to provide for an entry level fishery. The reduced allocation to the jig sector still allows for growth in this sector and is closer to its historic harvest share than its current allocation. Additionally, this allocation serves as a "bank" for anticipated growth in the harvest of Pacific cod in all catcher vessel sectors given that unused portions of the jig gear allocation are annually reallocated first to the fixed gear <60 ft (18.3 m) LOA sector (another small boat, entry-level sector), and then to other CV fleets that deliver to fishing communities. Also, under Amendment 85, reallocations from the jig sector will be available to the fixed gear <60 ft (18.3 m) LOA sector earlier in the year. Being able to harvest the fish earlier in the year when the weather is preferable for these small boats (safety is a consideration under National Standard 10), should

enable this sector to harvest more of the reallocated fish than it does currently. Therefore, in light of the likelihood of reallocations of any unused allocations to the <60 ft (18.3 m) LOA fixed gear sector, and to other CV fleets that deliver shoreside to fishing communities, the allocation of 1.4 percent of the Pacific cod TAC to the jig sector is fair and equitable and meets the purpose and need of the action to consider socio-economic and community factors.

For the small boat sectors to receive allocations above their average historic harvest, some sectors must receive less than their average historic harvest. The four sectors that will receive lower allocations than their average historic harvests are the pot CV [gteqt]60 ft (18.3 m) LOA, hook-and-line CP, pot CP, and trawl CV sectors. Their allocations represent a reasonable balancing of Magnuson-Stevens Act National Standard requirements while also meeting the purpose and need of the action. The pot CV ≥60 ft (18.3 m) LOA sector and the hook-and-line CP sector will receive allocations that are closer to their average historic harvests than are their current allocations and are only slightly less than their average historic harvests. Because the small boat sectors will receive allocations above their historic harvest it is expected that the pot CV >60 ft (18.3 m) LOA sector and the hook-and-line CP sector also may receive reallocations toward the end of the fishing year, which will make their share of the TAC closer to their historic share of the harvest. Additionally, the pot CV ≥60 ft (18.3 m) LOA and trawl CV sectors may receive reallocations of Pacific cod from other CVs or from CPs of the same gear type. Also, the pot sectors are primarily dependent on crab fisheries rather than on

the Pacific cod fishery. The pot CP and trawl CV sectors are the only sectors, other than the fixed gear <60 ft (18.3 m) LOA sector, that will receive allocations that are less reflective of their average historic harvests between 1995 and 2003. Recent trends demonstrate that the pot CP and the trawl CV sectors' harvest shares have decreased in recent years, such that the allocations under Amendment 85 better reflect these sectors' average harvest shares between 2000 and 2003 than do the current allocations. The AFA trawl CP sector was the only other sector that decreased its average harvest share between 2000 and 2003, but was not selected to fund the increases in other sector allocations for the reasons stated above. The allocation to the pot CP sector is fair and equitable because of its more recent decreased harvest share and its greater dependence on the crab fisheries. Although the trawl CV sector allocation is reduced, a combined allocation of Pacific cod to the AFA and non-AFA trawl CVs will take advantage of the existing AFA inshore cooperative structure for discussion and agreement concerning access to fishing grounds and harvesting activities in a manner that optimizes the allocation to this sector for all CVs. Additionally, public testimony at the April 2006 Council meeting requested that the two trawl CV sectors remain combined. A combined allocation also is larger than separate allocations to either the non-AFA or AFA CVs, thus providing some protection in the event that trawl vessels that have not historically participated in the fishery choose to do so.

Comment 14: The AFA trawl sectors would receive the largest aggregate increased share of the Pacific cod fishery under the Council proposal - 1.2 percent over the combined AFA trawl CP and trawl CV history from

1999 through 2005.

Response: The data presented in the analysis include historic harvest from 1995 through 2003 as the primary basis for determining historic use of Pacific cod by sector, although data from 2004 to 2005 are presented as well. The Council did not make its proposal based on catch history from 1999 through 2005 based on reasons given in response to Comment 3. The trawl CV and AFA trawl CP sectors do not receive a combined allocation. The AFA trawl CP sector will receive a share of the non-CDQ Pacific cod TAC that is 0.1 percent higher than its historic share from 1995 through 2003. The AFA trawl CV sector will receive an allocation in combination with the non-AFA CV sector. That allocation will be 1.9 percent less than its historic share from 1995 through 2003. Combining the AFA trawl CP sector with the trawl CV sector results in a combined decreased share of 1.8 percent of the non-CDQ Pacific cod TAC.

Comment 15: The proposed allocation of 13.4 percent to the non-AFA trawl CP sector is significantly less than this sector's actual dependence and use. The allocation scheme proposed by Amendment 85 will put the H&G sector in an economically precarious position, slashing its recent usage of cod by up to 30 percent based on its harvest in 2004. The APA requires agency actions, such as Amendment 85, to bear a rational relationship to the problems they are intended to address. Reducing the non-AFA trawl CP's allocation so substantially below its actual harvest levels over the past seven years does not serve the Council's "primary objective" of reducing the need for annual reallocations. The Notice of Proposed Rulemaking relies upon figures that clearly

demonstrate this point. The Notice of Proposed Rulemaking specifically points out that the non-AFA trawl CP sector's retained harvest "has not been less than 15.3 percent since 2000."There is no rational basis in the record to justify the reduction in cod TAC suffered by the H&G sector in this Council recommendation.

Response: The allocations were based on long-term dependence and catch history over many years. The harvest history was not based on just one or two years of harvest by a particular sector (see responses to Comments 3 and 13). The Council had the option to select from six sets of specific years or to select percentages for the Pacific cod allocations that fall within the range of percentages analyzed. The Council chose the latter course of action. Thus, as the information was presented in the analysis, the focus was on Pacific cod harvest history from the years 1995 through 2003. NMFS recognizes that the selection of certain year sets will be more beneficial to some sectors than the selection of other year sets. In setting the percentages, the Council made a reasonable balance of the National Standards under the Magnuson-Stevens Act, particularly National Standards 4 and 8 which deal with allocations and community considerations respectively. In examining the Council's action, NMFS determined that the allocations reasonably reflect the historic harvest of Pacific cod by each sector between 1995 and 2003. NMFS determined that consideration of the earlier years (1995 through 1998) is reasonable and that calculating harvest history through 2003, rather than 2004 or 2005, is reasonable for the reasons given in response to Comment 3.

As stated in the proposed rule, the primary objective of the Council was to reduce the level and frequency of annual reallocations, and thus enhance stability so each sector may better plan its fishing year and operate more efficiently. Annual reallocations are expected to be reduced under Amendment 85, and are thus related to the revised allocations to each sector that more closely reflect historic use by most sectors than do current allocations, while considering socioeconomic and community factors. As noted in the response to Comment 13, nearly half of the annual reallocations between 2000 and 2004 have come from the trawl CP sectors and those reallocations averaged 19.4 percent of the initial trawl CP sector allocation.

Comment 16: National Standard 4 provides that "If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be...fair and equitable to all such fishermen..." Elaboration of this requirement under § 600.325(c)(3)(i)(A) requires that the particular allocation chosen be "rationally connected to the achievement of OY [optimum yield] or the furtherance of a legitimate FMP objective..." and that "the motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause."In this case, the objective to conform allocations to current usage (to reduce late-year reallocations of unharvested fish) and dependency cannot be rationally served by reducing the non-AFA trawl CP sector allocation to one-quarter to one-fifth below its actual recent harvest levels or by allocating more than recent harvest levels to other sectors. Under National Standard 4, an allocation may impose a hardship on one

group if it is outweighed by the total benefits received by another group or groups. The Council would have had to make an estimate of the benefits and hardships imposed by the allocation and compare them to those of alternative allocation schemes, including the status quo. The Council did not do that.

Response: NMFS has determined that the allocations are fair and equitable to all sectors. Between the two quotes from the Code of Federal Regulations is the sentence "Inherent in an allocation is the advantaging of one group to the detriment of another."This action also is designed to increase the Pacific cod allocation to the small boat sectors which is a legitimate FMP objective. The management objectives in the FMP include promoting sustainable fisheries and communities. Because the small boat sectors deliver to fishing communities, increasing allocations to these sectors should promote these fishing communities. This action also will decrease the amount of Pacific cod that is reallocated to other sectors later in the season, facilitating these sectors' ability to achieve optimum yield by better planning their fishing year and operating more efficiently. The response to Comment 3 provides NMFS' rationale for why the years 1995 through 2003 are a reasonable, fair, and equitable set of years for determining the average historic share of the retained Pacific cod harvest. Using that set of years, the non-AFA trawl CP sector received a fair and equitable allocation which is exactly its average historic harvest share from 1995 through 2003. Please see the response to Comment 13 for a discussion of all sectors' allocations.

Comment 17: Every sector was allocated its target and

incidental cod needs, except the H&G sector. This discrepancy is not specifically highlighted in the draft Secretarial Review. The H&G fleet was allocated an insufficient amount for accommodating both a directed fishery and incidental catch needs and, by inference, was given a choice: target or bycatch, but not both. This violates National Standard 4, that allocations be fair and equitable to all fishermen. When one sector must decide between its target fishery and its other groundfish fisheries, while others have been allocated in excess of or close to their recent harvests, it is neither fair nor equitable, particularly in light of the fact that it was never addressed in the EA/RIR/IRFA.

In economic terms, NMFS' inseason manager estimates that under Amendment 85, the H&G sector would lose about 10,000 metric tons of cod in 2007 compared to expected harvest under the status quo. NMFS' in-season manager also estimates that in order to account for the incidental catch needs of the fleet for its flatfish and other fisheries, the agency will only be able to allow for a directed fishery of 10 or 11 days, whereas currently, the directed cod fishery is seldom closed. Owners, employees, observer providers, support companies, and the ports the vessels call on may suffer economic hardship under Amendment 85. We respectfully request that the Secretary disapprove the allocations.

Response: NMFS has approved the non-CDQ allocations of Pacific cod under Amendment 85. Every sector, except the small boat sector, was allocated an amount of Pacific cod that reflects its average historic harvest and dependence over many years that included target and incidental catch to the extent that incidental

catch was retained. Information on the historic harvest share for the non-AFA trawl CP sector was provided in the EA/RIR/FRFA, just as it was for all the other sectors. The non-AFA trawl CP sector's allocation of 13.4 percent of the Pacific cod non-CDQ TAC is 100 percent of its average historic harvest between 1995 and 2003, an exact reflection of its historic use and reflective of this sector's dependence on the resource over many years. Its recent increase in directed fishing for Pacific cod does not reflect a long-term dependence on the fishery. NMFS acknowledges that accommodating target and incidental catch may be more difficult for the non-AFA trawl CP sector when compared to its most recent few years' harvest.

The economic impacts of Amendment 85 were analyzed in the RIR and IRFA. Because this action is principally designed to reapportion access to the Pacific cod resource among current user groups, it represents tradeoffs (i.e., some entities are negatively affected while others are positively affected). The estimates referred to by the commenter were provided by NMFS a few weeks after the April 2006 Council meeting as a worst case scenario using lower acceptable biological catch (ABC) and TAC levels than actually were established for 2007 and assuming that the non-AFA trawl CP sector would continue conducting its fisheries as it does currently. Revising the estimates for 2007 based on the actual TAC and with a CDQ allocation of 10.7 percent would yield an estimate of 19 to 20 days of directed fishing under current non-AFA trawl CP fishing practices. If incidental catch rates of Pacific cod in other groundfish fisheries are reduced below the current rates, the non-AFA trawl CP sector should be able to maintain a directed fishery for Pacific cod for an

even longer period of time. As stated in the EA/RIR/FRFA on pages 294 and 295: "With a lower potential allocation compared to recent years, this sector will likely need to determine how much of its cod allocation will be used as incidental catch to other target fisheries versus to fund the directed cod fishery," and "Absent a cooperative structure as approved [by the Council] in [proposed] Amendment 80, it is expected that compliance with the groundfish retention standards and management of a lower Pacific cod allocation to serve both directed and incidental catch needs, will be substantially more difficult."See response to Comment 16 regarding consistency of Amendment 85 and this final rule with National Standard 4.

Comment 18: The loss of a directed cod fishery leaves the H&G fleet with no fishery from the end of the yellowfin sole fishery (which ended in mid-April of 2006) until July, when the "B" season starts. No other fleet will see its current operations disrupted by Amendment 85 the way that the H&G sector will.

Response: Under existing regulations, Pacific cod allocations are further apportioned by season for most gear sectors to protect prey availability for Steller sea lions. Currently, the trawl CPs, AFA and non-AFA combined, receive 50 percent of their allocation in the A season, 30 percent in the B season, and 20 percent in the C season. See the proposed rule for more details on seasonal allowances. Beginning in 2004, the trawl CP sector Pacific cod fishery has closed in mid-March due to reaching it's a season allowance. The B season for trawl CPs opens on April 1 and closes on June 10. More than half the incidental catch of Pacific cod by trawl

CPs occurs after March. Amendment 85 changed the seasonal allowances for the trawl CP sectors so that 75 percent of the allocation may be harvested in the A season, with the remaining 25 percent harvested in the B season. This was done to maintain to the extent possible the current percentage of non-CDQ Pacific cod TAC available for harvest in the early part of the year when fishing for Pacific cod is more advantageous. If incidental catch rates of Pacific cod in other fisheries are kept low, the non-AFA trawl CP sector should be able to maintain a directed fishery for Pacific cod.

Comment 19: The AFA trawl CP sector was funded with more than their recent (99-05) usage of 1.9 percent. That sector has its pollock fishery cod bycatch needs met at the all time high 1.5 million mt pollock TAC level, even as the pollock biomass and TAC are on a downward trend. With a 2.3-percent allocation, and lower pollock TAC, more cod can be used to enhance their directed fishery, which is essentially an IFQ [individual fishing quota] since only one vessel is used in the fleet to directed fish on cod. That vessel is also an AFA eligible CP, and while on the record it was stated that it has nowhere to go other than cod, the vessel has access to the yellowfin sole sideboard and the directed pollock fishery of the AFA CPs. It is the vessel owner's decision not to fish pollock or yellowfin sole with that vessel.

Response: The AFA trawl CP sector will receive an allocation that is 0.1 percent above its average historic share of 2.2 percent of the Pacific cod harvest. NMFS provided the agency's explanation for approving the AFA trawl CP Pacific cod allocation in the response to Comment 13. NMFS agrees that it is each vessel

owner's decision whether or not to harvest fish in the fisheries open to that particular vessel. However, it is a goal of this amendment to allocate Pacific cod to specific sectors based on average historic harvest, not to determine what fisheries are open to specific vessels or to establish other vessel-specific provisions for access to Pacific cod or other groundfish. Also, the AFA trawl CP sector allocation is less than its current sideboard limit for harvesting Pacific cod (see response to Comment 13).

Comment 20: The reduced ability to target Pacific cod during the A season for the CP trawl sector has resulted in more rollovers to fixed gear; the cod that would have been caught in March when the fish are most aggregated, has not been caught. The fishery in the last two years has closed in early-mid March due to the 50 percent season limit and reduced cod TACs. This has benefitted the fixed gear sector which gets the rollover in the C season, at the end of the year. The Steller sea lion management measures drastically altered cod fishing patterns and harvests. The patterns were altered because of the seasonal apportionments, not because of changed priorities or reduced dependency on the part of the harvesters.

Response: Almost all gear types, excluding <60 ft (18.3 m) LOA fixed gear, are restricted in their amount of Pacific cod catch in the first half of the year because of SSL protection measures, not just the trawl CP sector. A goal of Amendment 85 is to reduce the amount of reallocations due to unharvested Pacific cod left toward the end of the fishing year. The trawl CP sectors have not harvested their entire allocation in any year since that sector began receiving a separate Pacific cod

allocation in 1997. The jig sector is the only other sector that has also had Pacific cod reallocated from it in every year it has received a Pacific cod allocation. Beginning in 2004, NMFS has closed the trawl CP sector Pacific cod fishery in mid-March due to reaching its "A" season allowance. The B season opens on April 1 and closes on June 10. In 2005, NMFS closed the trawl CP sector Pacific cod directed fishery on August 18 because it had reached its halibut PSC mortality limit. In 2006, NMFS closed the trawl CP sector Pacific cod directed fishery on June 8 (just before the end of the B season), opened it on July 19, and closed it on August 31 due to halibut PSC mortality considerations. So in the last two years, the trawl CP sector Pacific cod directed fishery has been closed during the C season due to reaching its halibut PSC mortality limit. Halibut PSC mortality limits and seasonal allowances to protect SSLs have affected most sectors to varying degrees. It is up to each sector to try to keep its Pacific cod incidental catch rates and PSC catch rates low if it wants to maintain a directed fishery for Pacific cod. Also note that the seasonal allowance percentages have changed under Amendment 85 (see response to Comment 22).

Comment 21: The State waters Pacific cod fishery has taken 3 percent of the Pacific cod ABC for the past two years, to fund a fishery in Adak which is closed to trawl CPs over 100 ft. This reduces the BSAI Pacific cod TAC by 3 percent. While this is calculated by NMFS to be taken "off the top," if one looks at the allocations to each sector, it can be argued that it's really the H&G sector that took the hit. The H&G sector's 2004-2005 harvest (Table 3-12 - retained, incl. meal) was 17.7 percent. The H&G allocation is 13.4 percent. The cumulative effect of the increased CDQ and State

waters fishery, is a further reduction in TAC of 6.2 percent. The original ITAC was 92.5 percent of TAC, now it will be 86.3 percent of TAC. This reduction is spread disproportionately among sectors.

Response: NMFS disagrees. The Council is free to choose how much of the Federal Pacific cod TAC it allocates to small vessels regardless of the existence of a State of Alaska-managed Pacific cod fishery in State waters. The State waters Pacific cod fishery is not within the Council's or NMFS' jurisdiction and can be modified by the State at any time. The amount of Pacific cod set aside for the State waters fishery has not and will not come from the non-AFA trawl CP sector allocation alone. Additionally, all trawl CPs >100 ft (>30.5 m) do not have access to the State waters Pacific cod fishery, not just the non-AFA trawl CPs.

The process followed by NMFS in setting the allocations for Pacific cod each year in the annual specifications process is to first deduct the amount of Pacific cod for the State waters fishery from the ABC. The remainder is the TAC for a particular year. NMFS then deducts the amount of Pacific cod allocated to the CDQ Program. Finally, the remaining non-CDQ TAC is divided among the sectors. The reductions are taken before allocations are made to the non-CDQ sectors and, thus, affect all sectors proportionately.

Comment 22: The EA/RIR/IRFA analyzed the impact of reallocating cod from trawl to fixed gear and determined that the trawl CP sector would have no C season cod, unless it rolled from within the sector's B season. Even with no cod TAC reductions, the trawl CPs will be severely constrained with the 50 percent

limit for the A season, and this will filter through to the end of the year. The other trawl and fixed gear fleets that were well funded are in no worse position than they were prior to the Amendment 85 action.

Response: The Council directed that allocations for the A and B seasons for trawl gear and the A season for fixed gear sectors be calculated to maintain the current seasonal percentage of the non-CDQ TAC that is allocated to those sectors. This was done to allow directed fishing for Pacific cod earlier in the year when there is less PSC bycatch, Pacific cod harvest rates are highest, and to maintain SSL protection measures. Under this action, the A season allowance for the non-CDQ trawl CP sectors will increase from 50 percent to 75, with the remaining 25 percent seasonal allowance available in the B season. That is why there would be a C season harvest only if seasonal allowances roll over from the A or B seasons to the C season.

Comment 23: The non-AFA trawl CP fleet makes important economic contributions to remote Alaskan communities that the Council's reduced allocation to that sector may well jeopardize. The non-AFA trawl CP fleet fishes year round, using support services and relying on vendors which would normally be closed in the late spring/summer months were it not for this fleet's activities. The State of Alaska assesses all fish landed in Alaska, regardless of gear or sector designation. Whether harvested by CVs or CPs, the same landing taxes would be generated, and given back to the communities in which the fish would be offloaded. Any suggestion that community impacts support imposing the burden of funding the increased small-boat allocations solely (or even primarily) upon the non-

AFA CP fleet is not based in fact or supported by the record.

Response: NMFS acknowledges that the non-AFA trawl CP fleet makes economic contributions to the communities visited by vessels in that sector. Based on the EA/RIR/FRFA, NMFS does not expect a significant impact on remote Alaskan communities due to the non-AFA trawl CP allocation under Amendment 85. Any potential negative effects on remote Alaskan communities are likely to be outweighed by the positive impacts of the increased allocations to the small boat sectors, which are based primarily out of Alaskan communities. See response to Comment 13 regarding the "funding" of the allocations to the small boat sectors.

Comment 24: A separate section of the Magnuson-Stevens Act, 16 U.S.C. 1853(b)(6) requires the Council and the Secretary to consider a certain set of relevant factors as a condition to establishing a limited access system for a fishery.

Response: NMFS agrees that section 303(b)(6) of the Magnuson-Stevens Act (16 U.S.C. 1853(b)(6)) requires the Council and NMFS to take into account several factors when establishing a limited access system. However, Amendment 85 does not establish a limited access system for the Pacific cod fishery because it does not affect existing participation requirements for the BSAI Pacific cod fishery. Therefore, section 303(b)(6) is not applicable to Amendment 85.

Comment 25: NMFS should approve Amendment 85 with a Pacific cod allocation for the AFA trawl CP

sector significantly greater than the 2.3 percent proposed by the Council. Appropriately calculated, the retained legal catch of the AFA trawl CP sector averaged approximately 2.5 percent of the total retained legal catch of BSAI cod between 1999 and 2003, the relevant years following passage of the AFA in 1998. The 2.3-percent allocation recommended by the Council and contained in the proposed amendment represents the absolute minimum amount necessary to fund both the bycatch needs of the AFA trawl CP pollock fishery and the relatively small directed fishery that at least one of the AFA trawl CP vessels has been conducting in the BSAI for many years. Ultimately, the way the incidental catch allowance is established and managed will determine the extent to which these objectives can be accomplished.

Response: The AFA trawl CP sector will receive an allocation that is slightly higher than its average historic harvest from 1995 to 2003, one of only two non-small boat sectors to do so. About 44 percent of the Pacific cod harvested by the AFA trawl CP sector during that time period was taken incidentally when these vessels were targeting BSAI pollock. See the response to Comment 3 for why these years of historical harvest are appropriate. The allocation to the AFA trawl CP sector should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery in addition to meeting its incidental catch needs in other fisheries. The incidental catch allowance for the AFA trawl CPs will be established inseason with the intent of maintaining a directed Pacific cod fishery.

Comment 26: We support the proposed rule's plan to

manage each of the trawl sector incidental catch allowances on an inseason basis. The proposed amendment should be revised to direct NMFS to manage any incidental catch allowance established in connection with the AFA trawl CP sector's Pacific cod allocation to facilitate, to the maximum extent practicable, the prosecution of an early season directed Pacific cod fishery without jeopardizing the need to retain sufficient Pacific cod for bycatch in the directed pollock fishery later in the year.

Response: NMFS notes the support for establishing trawl sector incidental catch allowances on an inseason basis. NMFS' existing policy for establishing incidental catch allowances is to facilitate, to the extent practicable, directed fisheries while retaining amounts needed as incidental catch in other directed fisheries. NMFS does not need regulatory authority to continue this policy, so no regulatory changes are necessary.

Comment 27: Tables 3 and 8 of the proposed rule are inaccurate and understate the legally retained BSAI Pacific cod catch history of the AFA trawl CP sector. Table 3 does not use the "best available data" to calculate the AFA trawl CP sector's catch history for the years after 1998. In Table 8, the range for the AFA trawl CP sector includes a lower end point of 0.9 percent. That number is misleading for several reasons: first, it is derived by excluding fish utilized in the production of meal; and second, it is generated by using a WPR approach to calculate retained catch. This is inaccurate and prejudicial in that it suggests a level of usage and dependency that is significantly lower than accurately calculated catch would indicate.

Response: Regarding Table 3 in the proposed rule, the response to Comment 2 explains why WPR data were used instead of observer data to calculate catch history. The purpose of including Table 8 was to demonstrate the wide range of allocations that were considered by the Council. The allocation to the AFA trawl CP sector is slightly above its catch history as calculated from WPR data from 1995 through 2003. Also see responses to Comments 13 and 25.

Comment 28: We prefer to purchase all of the Pacific cod for our restaurant chain from a particular AFA trawl CP because of the high quality of the product. If the amount of Pacific cod available for that vessel to harvest were to decline, we would likely be forced to purchase lower quality processed cod from foreign commodity markets.

Response: Under Amendment 85 and this final rule, the AFA trawl CP sector will receive an allocation of Pacific cod that is slightly above its historic harvest. Because the AFA trawl CP sector operates as a cooperative and has the ability to control its harvest, NMFS anticipates that the amount of Pacific cod allocated to the AFA trawl CP sector will be sufficient to maintain the sector's directed fishery while meeting its incidental catch needs in other fisheries.

Comments on Dependency on the Pacific Cod Fishery

Comment 29: The non-AFA trawl CP sector asserted that the Pacific cod allocation they received will be insufficient to prosecute their flatfish fisheries. However, that does not appear to be the case. From 1999 to 2003, the non-AFA trawl CP sector took 54

percent of their Pacific cod in directed Pacific cod fishing and 46 percent incidentally while targeting other species (flatfish, etc.). In 2003, 63 percent of the non-AFA trawl CP sector Pacific cod was taken in directed Pacific cod fishing and 37 percent was taken incidentally. The allocation the non-AFA trawl CP sector received is 90 percent of its 1997 to 2003 average catch history. For comparison, the pot CP sector received an allocation that is 88 percent of its 1997 to 2003 catch history. The trawl CV sector allocation was 97 percent of its 1997 to 2003 catch history. The hook-and-line CP sector received an allocation that is 97 percent of its 1997 to 2003 catch history. However the hook-and-line CP sector's dependency on BSAI Pacific cod is four times that of the non-AFA trawl CP sector and more than twice that of the pot CP sector and the trawl CV sector.

Response: Please see the EA/RIR/FRFA for the best available data on the BSAI Pacific cod fishery. All the sectors are dependent on the BSAI Pacific cod resource, albeit to varying degrees. Based on the average annual estimated total first wholesale revenue from groundfish products between 1999 and 2003, the hook-and-line CP sector is more dependent than the other sectors on the BSAI Pacific cod resource.

Comment 30: The proposed allocations do not correlate with actual dependency and use by sector. The non-AFA trawl CP sector is highly dependent on Pacific cod as a directed fishery and as an incidentally caught species in every target fishery the sector prosecutes. The H&G fleet will lose most of its directed cod fishery under the Amendment 85 allocation because almost half of the cod harvested by the H&G fleet is incidental cod

in other groundfish fisheries. This fishery now represents over a quarter of all non-AFA trawl CP sector revenues. This aggregate figure, as large as it is, masks the fact that Pacific cod accounts for well over half of the revenues for particular non-AFA trawl CP vessels, particularly the smaller vessels in the fleet. If the Amendment 85 allocation and CDQ increases took place in 2007, and assuming a harvest equal to that of 2005, the fleet would shut down in late May due to insufficient cod. The sector would lose 34 percent of its annual 1999 to 2004 average revenues for the fleet.

Response: NMFS acknowledges that the non-AFA trawl CP sector Pacific cod allocation under Amendment 85 is less than the percentage harvested by the sector in very recent years and that this sector's harvest has increased in recent years. However, the allocation is not based on one or two recent years, but is reflective of long-term dependence as evidenced by harvest over a longer period of time. The Council decided that long-term dependence was appropriate and NMFS determined that the record supports this approach (see response to Comment 15). Based on recent fishing practices by the fleet, NMFS has determined that this sector will maintain a directed Pacific cod fishery and will be able to prosecute other fisheries (see response to Comment 17).

Comment 31: The analysis does not address the issue of lost revenue from low allocations on either the H&G fleet's other groundfish fisheries or from loss of the target fishery itself. Stating that 21 percent of the annual revenues of the fleet are from cod oversimplifies the picture. The information before the Council on Amendment 80 (June 2006 C-1 Supplemental to

Amendment 80) states that the H&G sector's revenues from cod are actually 25 percent (99-04 avg). However, we are more realistically 100 percent dependent on cod because it is critical to all our target fisheries. Not only will we lose some percentage revenue from loss of a directed cod fishery, but we can lose the value of the non-cod groundfish target fishery as well. The Council and the analysis for Amendment 85 also failed to consider that the non-AFA trawl CP sector is dependent on Pacific cod for incidental catch in its flatfish, mackerel, and rockfish fisheries. The first real analysis of the impact of the Council's decision upon the non-AFA trawl CP sector was made by NMFS only several weeks later, and it found that impact to be severe. Substantial bycatch of Pacific cod in these fisheries is inevitable. This bycatch amounts to almost half of the non-AFA trawl CP sector's harvest of Pacific cod. We are no less dependent on our cod revenue than a cod longliner which does not engage in any other groundfish fisheries. The reduction in the Pacific cod allocation to the non-AFA trawl CP sector will affect its entire BSAI fishing effort. Without cod, no one in the H&G fleet can fish in any BSAI target.

Response: NMFS believes that the non-AFA trawl CP sector has a sufficient Pacific cod allocation for a directed Pacific cod fishery. The size of the directed Pacific cod fishery will depend on the sector's need for Pacific cod as incidental catch in its other directed groundfish fisheries. The EA/RIR/IRFA examined this issue and concluded that the sector's directed fishery is likely to be affected by the allocation. The EA/RIR/FRFA acknowledges the need for the allocation to include incidental catch needs on page 279: "The problem statement for this amendment

emphasizes that the Pacific cod allocations should be adjusted in order to reduce uncertainty in, and provide stability to, the sectors. Allocating appropriate amounts of incidentally caught cod, so that each sector's directed fisheries can be harvested, is an important concern when creating stability."Also stated on page 293: "As mentioned above, the non-AFA trawl CP sector harvests a significant portion of its BSAI Pacific cod as incidental catch in a non-Pacific cod target fishery. Table 3-101 shows that the non-AFA trawl CP sector harvested about 54 percent of its total retained cod harvest in the target cod fishery on average during 1999 to 2003; the remaining 46 percent was harvested as incidental to all other target fisheries, primarily the flatfish fisheries (yellowfin sole, rock sole, flathead sole, Atka mackerel, and Pacific ocean perch). With a lower potential allocation compared to recent years, this sector will likely need to determine how much of its cod allocation will be used as incidental catch to other target fisheries versus to fund the directed cod fishery." Also, see response to Comment 17.

What this sector is "losing" is the opportunity to harvest an amount of Pacific cod that is larger than its historic use and dependence. The trawl CP sector has not harvested its entire allocation of Pacific cod since allocations began in 1994. The trawl CP sector has been the largest contributor to the yearly reallocations that this amendment is designed to reduce, therefore, the allocation to the trawl CPs is justified. Also see response to Comment 30.

The commenter may be assuming there is hard cap management under Amendment 85, but Amendment 85 does not include this provision (see response to

Comment 77).

Comment 32: Incidental catch of Pacific cod allows harvesters to maximize the value of the other target species because it is in large part the highest valued species in each of those non-AFA trawl CP target fisheries.

Response: NMFS acknowledges that Pacific cod is a valuable species. The non-AFA trawl CP sector will have to manage its Pacific cod allocation to accommodate target and nontarget needs to optimize the value of its harvest of BSAI groundfish.

Comment 33: Non-AFA vessels are excluded from any access to the pollock fishery and now the Council is proposing to take away from them a significant portion of the Pacific cod fishery that, over a demonstrated period of years, they have used and are dependent upon, while at the same time augmenting the fishing privileges of AFA trawl CP vessels that have neither been using nor depending upon the cod fishery at more than a minimal level during that same relevant period. That proposal does not comport with this Council's obligation to "protect other fisheries . . . and the participants in those fisheries . . . from adverse impacts caused by [the AFA] or fishery cooperatives in the directed pollock fishery."

One final noteworthy recognition by the Notice of Proposed Rulemaking is that the Council decided to "maximize the opportunity for a directed Pacific cod fishery" for the AFA trawl CP sector, 72 FR 5662 (col. 1, top), but was content to underfund the non-AFA trawl CP sector to such an extent that it "may be

constrained in its ability to conduct a directed fishery for Pacific cod in order to have sufficient Pacific cod available for incidental catch in its other fisheries."Id. (col. 1, bottom). This turns upside down the Council's obligations under the AFA.

Response: Sideboards are intended to prevent a sector from using advantages gained from a rationalized fishery in a fishery that is not rationalized. The current AFA CP Pacific cod sideboard prevents AFA trawl CPs from harvesting a larger share of Pacific cod than the sector harvested before the AFA. Amendment 85 will separate the trawl CPs that currently share one allocation into two sectors, AFA and non-AFA. The AFA trawl CP sector will receive 0.1 percent of non-CDQ TAC above its average harvest history under Amendment 85 and the non-AFA trawl CP sector will receive exactly its average historic harvest. The AFA trawl CP fleet will be restricted to a separate allocation slightly greater than its historic catch from 1995 through 2003, but 62.3 percent below its current sideboard limit for catch of Pacific cod. Although the non-AFA vessels are excluded from the pollock fishery in the BSAI, AFA sideboard provisions will continue to restrict those vessels from participating in other BSAI fisheries, and AFA trawl CPs will continue to be prohibited from fishing in the Gulf of Alaska. Therefore, NMFS has determined that the AFA trawl CP allocation of Pacific cod under Amendment 85 is consistent with the AFA. Also, separating the two sectors will protect the historic catch of the non-AFA trawl CPs better than leaving these two sectors combined with a lower shared allocation that reflects their combined history, but with the same AFA sideboard. NMFS believes the allocations of Pacific cod

to the AFA and non-AFA trawl CP sectors are sufficient for each sector's directed Pacific cod fishery and for their incidental catch needs and that the allocation for the non-AFA trawl CP sector will be better protected under Amendment 85 than leaving the sectors combined.

Comment 34: To whatever extent the sector's total catch history is not reflected in the initial allocation made under Amendment 85, there will be insufficient fish in the AFA trawl CP sector's allocation to meet the bycatch needs of the pollock fishery without depleting, at least to some extent, the allocation that would otherwise be available to our directed cod vessel. As a consequence, the directed cod fishery that vessel has traditionally conducted during the early part of the fishing year will likely be curtailed, if not eliminated.

Response: Given that the allocation to the AFA trawl CP sector under Amendment 85 is slightly higher than its average historic harvest, that allocation should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery in addition to meeting its needs for incidental catch in its pollock and yellowfin sole fisheries.

Comment 35: The Council increased the allocation to the AFA trawl CP sector so that Pacific cod would not be a limiting factor in prosecuting the BSAI pollock fishery. From 1999 to 2003, the AFA trawl CP sector took 84 percent of its Pacific cod in directed Pacific cod fishing and only 15 percent in the pollock fishery. The proposed rule states that 44 percent of the Pacific cod taken by this sector occurs incidentally in the pollock fishery. This is in contrast to the analysis (15 percent),

therefore the proposed rule must be including fishmeal and other factors. Either way, it does not appear that the allocation this sector received under Amendment 85 will be constraining in the pollock fishery.

Response: As stated in the proposed rule, the allocation to the AFA trawl CP sector was chosen to "maximize the opportunity for a directed Pacific cod fishery and to minimize the potential for an increase in discards of Pacific cod if catch exceeds the MRA."The commenter apparently relied on the April 2006 draft analysis and used Table 3-105 which excluded fishmeal. However, the information was revised before submission to the Secretary. The EA/RIR/FRFA includes fishmeal in the revised information in Table 3-101 and states on page 294 that, "the AFA CP sector harvested about 56 percent of its total retained cod harvest in the target cod fishery on average during 1999-2003, the remaining 44 percent was harvested as incidental to other target fisheries, primarily pollock."Additionally, in the final Council motion from April 2006, the Council explicitly noted that in order to determine PSC, the percentage of Pacific cod harvested in the Pacific cod target fishery by the trawl sectors should be calculated on the basis of all cod catch from 1999 through 2003, including that designated for fishmeal production.

Comment 36: Only the hook-and-line CP sector has a large and primary dependence on BSAI Pacific cod; it is the sector with the most dependence on the BSAI Pacific cod resource. Over 80 percent of the wholesale revenues of the hook-and-line CP sector come from BSAI cod.

Response: NMFS agrees that the hook-and-line CP

sector is the sector that has the highest portion of its income from its Pacific cod fishery. However, other sectors also depend on Pacific cod for a significant portion of their income.

Comment 37: The H&G sector's Pacific cod use and dependence must be considered and accommodated by Amendment 85, just as was that of the hook-and-line CP sector.

Response: The non-AFA trawl CP sector will receive exactly its 1995 to 2003 average historic harvest under Amendment 85. The hook-and-line CP sector will receive 48.7 percent of the non-CDQ Pacific cod TAC under Amendment 85, which is closer to its average historic harvest than its current allocation of 40.8 percent. The hook-and-line CP sector's new allocation is less in all cases than its share of the retained harvest under various year groupings: from 1995 through 2003, from 2000 through 2003, and from 2004 and 2005 (see Amendment 85 proposed rule Tables 3 and 4). However, its history is much larger than its current allocation due to reallocations of unused Pacific cod from other sectors, primarily the trawl CP sector. Amendment 85 was designed to reduce the amount and frequency of these reallocations to increase stability for all sectors.

Comment 38: Amendment 85 will provide increased stability to the sectors with the most dependence on Pacific cod by removing the uncertainty of the amount of the potential annual harvest for each sector (i.e., reduce annual rollovers). This stability will promote efficiency and planning for those same sectors. For example, the increased stability of the BSAI Pacific cod

allocation may facilitate the formation of a hook-and-line CP cooperative that can result in increased utilization and efficiency.

Response: NMFS agrees that Amendment 85 will increase stability in the BSAI Pacific cod fishery.

Comment 39: The Council was consistent with past allocation actions by not including fishmeal when considering dependency on the resource.

Response: Contrary to the commenter's conclusion, the record for Amendment 85 and this final rule clearly demonstrate that the Council not only considered fishmeal data, but included fishmeal in the calculation of catch history for the AFA trawl CP sector allocation. When vessels directly affected by a proposed allocation action process fishmeal, it has been considered. It depends on what sectors or vessels are affected by an action as to whether fishmeal has been included or excluded. Fishmeal was not particularly relevant other past allocation actions. In current and proposed actions, fishmeal was excluded in the preliminary analysis for Gulf rationalization, which has been tabled. There is now an option to exclude fishmeal in the Gulf of Alaska Pacific cod sector-split analysis. However, these actions exclude the AFA trawl CPs, which are the primary producers of fishmeal. Therefore it is consistent to include fishmeal in considering a sector's dependency on Pacific cod under Amendment 85.

Comments on Groundfish Retention Standard Under Amendment 79

Comment 40: The allocation to the H&G fleet affects

the Amendment 79 groundfish retention standard (GRS) which the H&G fleet must meet, starting in 2008. Once Pacific cod is closed to directed fishing, and is taken as an incidental catch in other fisheries, it is subject to a maximum retainable amount of 20 percent of the total groundfish catch aboard a vessel. This will make compliance with the groundfish retention standards of Amendment 79 very difficult for most vessels. The Aleutian Island cod fishery is a very high retention fishery, and it essentially is no longer an option for us. According to NMFS inseason managers, the fleet will only have enough fish to fund an early directed cod fishery, which is essential as it occurs simultaneous to the rock sole fishery. The loss of our Aleutian Islands cod target is going to pose a retention hardship for two reasons: one, we lose our March cod target fishery in lieu of bycatch needs for the rest of the year, and two, the H&G fleet's cod will be on bycatch status for the majority of the year. So the reduced allocation has put the fleet in a position of mandatory discards of a mandatory retention species, until or unless the sector is able to form cooperatives under Amendment 80.

Response: As explained in the response to Comment 17, based on the actual TAC for 2007, but with the larger CDQ allocation of 10.7 percent, NMFS estimates there would be 19 to 20 days of directed fishing under the current practices of the non-AFA trawl CP sector. If the sector reduces its incidental catch needs for Pacific cod in its other directed fisheries, its Pacific cod directed fishery could last longer. Typically, the non-AFA trawl CP sector targets Atka mackerel, rock sole, yellowfin sole and Pacific cod in January and the Pacific cod fishery peaks in March. The non-AFA trawl CP

sector usually catches 80 percent of its Pacific cod allocation in the first two seasons, which is its seasonal allowance. To meet the GRS after their directed Pacific cod fishery is closed, the non-AFA trawl CPs will need to fish in a manner that maintains incidental catch rates at levels that minimize regulatory discards. Therefore, meeting the GRS under Amendment 85 may be more difficult for the non-AFA trawl CP sector.

If directed fishing for Pacific cod has not been closed to the non-AFA trawl CP sector, then this sector has had to keep their entire catch of Pacific cod, which improves their retention rate. But if the non-AFA trawl CP Pacific cod directed fishery will now be closed most of the year, the non-AFA trawl CP sector must retain up to the MRA. Any catch over the MRA must be discarded and those discards will count in the retention calculation under the GRS, potentially making it more difficult to comply with the GRS.

However, compliance with the GRS should be easier for the vessels that join a cooperative under Amendment 80, which was approved by the Secretary on July 26, 2007. The non-AFA trawl CPs may form harvesting cooperatives by the start of 2008 if Amendment 80 is implemented by January 1, 2008, which also is the effective date for this final rule to implement Amendment 85. Additionally, the Council has adopted a regulatory amendment that would adjust the accounting period for MRA amounts for particular species including Pacific cod. If approved by the Secretary, this adjustment also would be effective by January 1, 2008, and would reduce regulatory discards and facilitate compliance with the GRS under Amendment 79 to the FMP.

Comment 41: The revised Secretarial review EA/RIR/IRFA (October 2006) merely references the Groundfish Retention Standard (GRS) in one sentence that acknowledges that Pacific cod, as a highly retained species, is important to the non-AFA trawl CP sector in meeting the GRS. Neither Section 2.3.9 (Cumulative Effects) nor Section 2.3.9.1 (Past and Present Actions) mentions the Amendment 79 GRS in relation to the sector's cod allocation and what the loss of its directed fishery and lowered allocation will do to the sector's ability to meet the retention standard. There is no attempt to estimate the impact of a reduced allocation on the ability of the sector, or small vessels in particular, to meet the GRS scheduled for implementation in 2008. The analysis should have considered the impact of the non-AFA trawl CP sector's Amendment 85 allocation on the ability of this sector to function under status quo management (no harvesting cooperatives) when the GRS is imposed in 2008. The tipping point on meeting the GRS with regard to this action is the reduced cod allocation, not the open access race for fish.

Response: The Secretarial review draft EA/RIR/IRFA does discuss the cumulative effects of Amendment 85 in conjunction with the GRS and Amendment 80 in Section 2.3.9 "Cumulative Effects" under section 2.3.9.2 "Recent and Reasonably Foreseeable Future Actions."Improved retention rates are the intended effect of the GRS action under Amendment 79. Implementation of Amendments 79, 80, and 85 are planned for 2008. The GRS would be phased in over a four-year period.

The reduced allocation to the non-AFA trawl CP sector

likely will reduce its directed fishery, but the vessels still will be retaining Pacific cod to comply with improved retention/improved utilization requirements up to the 20 percent MRA percentage established for Pacific cod after the directed fishery is closed. The catch of Pacific cod beyond the 20 percent MRA threshold must be discarded. However, a vessel's total catch of Pacific cod still would be included in the calculation used by NMFS to assess compliance with the annual GRS ratio of retained catch to total catch. Thus, NMFS expects the GRS program would provide an incentive for the sector to fish for its other targeted groundfish species in a manner that reduces the incidental catch of Pacific cod to the extent practicable. In 2008, the GRS will be at a relatively low level to reflect fleet-wide status quo. As the GRS ratio steps up over the next four years, NMFS anticipates that it will parallel other new proposed management measures that provide additional opportunity for retention of groundfish, including proposed adjustments to the MRA accounting period for some species and Amendment 80.

The EA/RIR/FRFA recognizes that compliance with the GRS by the non-AFA trawl CP fleet with its new Pacific cod allocation under Amendment 85 will be more difficult. However, the purpose of Amendment 85 was to allocate Pacific cod based on historical retained catch in addition to socioeconomic and community concerns, not to allocate Pacific cod in a manner that would facilitate compliance with the GRS. There are other ways the fleet can improve its retention rates of Pacific cod without the allocation it has had in the past. For example, by avoiding fishing in areas with high bycatch rates of Pacific cod.

Regarding the estimation of economic impacts, the Secretarial review draft analysis stated "The Groundfish PSEIS [Programmatic Supplemental Environmental Impact Statement] noted that the availability and consistency of data limits the ability to analyze the effects of past actions on the economic condition of selected sectors of the Alaska groundfish fishery. According to the Groundfish PSEIS, analyses are also limited by the difficulty of delineating the cause-and-effect relationships between multiple factors and the resultant economic effects. Many factors substantially affect the economic status of the Alaska groundfish fishery. Changes in markets, biological conditions and fishery management regulations can result in changes in the revenues and operating costs of firms participating in the fisheries and changes in fleet size and composition. Isolating the effects of a single factor is seldom possible."

Amendment 80 will provide target allocations of Atka mackerel, flathead sole, Pacific ocean perch, rock sole, and yellowfin sole to the non-AFA trawl CP sector and allows the formation of harvest cooperatives. Sector allocations and associated cooperatives will allow participants to focus less on harvest maximization and more on optimizing harvest. The Secretarial review draft analysis further notes that, "Absent a cooperative structure as approved (by the Council) in Amendment 80, it is expected that compliance with the groundfish retention standards and management of a lower Pacific cod allocation to serve both directed and incidental catch needs, will be substantially more difficult."Note that the GRS pertains only to non-AFA trawl CP vessels that are [gteqt]125 ft (38.1 m) LOA, not to smaller vessels. However, under Amendment 80, the

GRS will apply to all non-AFA trawl CP vessels regardless of length.

Comments on Cumulative Effects

Comment 42: By applying the 13.4-percent allocation to, and deducting the 3 percent State water set-aside and 10.7 percent CDQ allocation from, the 2005 TAC for Pacific cod, the H&G fleet allocation would have been 23,911 mt, a loss of 6,000 mt from the H&G actual harvest in 2005. This represents a loss of $11 million in Pacific cod alone. The H&G fleet fully harvested 23,911 mt of Pacific cod by mid-June in 2005. The fleet would have been unable to harvest its other directed fisheries after June 11th and lost $43 million in its second half of the year target fisheries. In comparing the losses of different fleets, if the longline fleet lost 6,095 mt, that would be a loss of $11 million. The same fish represents a loss of $54 million to the H&G fleet, or, roughly 35 percent of its annual revenues. This was not analyzed in any Amendment 85 document.

Response: The non-AFA trawl CP fleet will have less Pacific cod available than it does under the current allocations, however, this scenario would not happen under Amendment 85. Because NMFS anticipates that the trawl sectors will fully harvest the Pacific cod allocations under Amendment 85, NMFS also anticipates it will need to establish an incidental catch allowance for each trawl sector. Under this final rule, NMFS will develop incidental catch allowances for each trawl sector on an inseason basis, rather than through the annual harvest specification process. The directed fishery for the non-AFA trawl CP sector will likely be shorter than in the past, thus the possible loss, but

under Amendment 85 the other non-AFA trawl CP fisheries will be managed with the intent of avoiding closures for lack of sufficient Pacific cod. Also, under this final rule, the non-AFA trawl CP sector will continue to be managed under a soft cap for incidental catch of Pacific cod.

Comment 43: The non-AFA CP fleet has not received representative allocations. We see that if these allocations were in effect in 2005, the fleet would have shut down in June, losing 35 percent of its annual revenues. This incurs economic harm not only to our fleet but also to remote communities that depend on the activities of the non-AFA CP fleet. As the sole harvesters of target fisheries that will be left in the water because of an inadequate cod allocation, communities will not receive landing tax revenues from that fish, and support service revenues from that fleet. Amendment 80 allocates 90 percent of the Atka mackerel and Pacific ocean perch to the H&G fleet. However, we saw that if Amendment 85, the State water fishery and the increased CDQ were in effect in 2005, half of the Atka mackerel would have been left in the water and all of the Pacific ocean perch, from a June 11th closure. This directly harms the residents of Atka and Adak. Stranding fish is not obtaining optimum yield.

Response: Under this action, an incidental catch allowance of Pacific cod will be established for use in the other non-AFA trawl CP sector directed fisheries. See response to Comment 42.

Comment 44: Effective 2007, the Central Gulf of Alaska Rockfish Pilot Program goes into effect. Originally a

two-year program, it was recently extended to five years under the Magnuson-Stevens Act reauthorization. That program limits participation in the Central Gulf rockfish fisheries to 15 H&G vessels. As with Gulf cod, and BSAI pollock, entry into other fisheries by the H&G fleet, and therefore other options, is becoming more restricted. These fisheries would have provided relief in the event that the lowered cod allocation shuts down the H&G fisheries prematurely.

Response: Amendment 85 does not contain measures that would prevent the non-AFA trawl CP sector from prosecuting its target fisheries. NMFS agrees that participation in Gulf of Alaska and BSAI fisheries is becoming more restricted as participation in these fisheries becomes more restricted. See response to Comment 42.

Comments on Small Boat Sector Allocations

Comment 45: The allocation process was reasonably fair and equitable. The jig and <60 ft (18.3 m) LOA fixed gear CV sectors received allocations larger than their respective catch histories. Accordingly, the majority of the other sectors then received allocations smaller than their respective catch histories to offset and "fund" those increases. However, the allocations in Amendment 85 were the result of a fair and equitable process and did not discriminate by residency.

Response: Comment noted.

Comment 46: Other considerations given to the small boat sectors under Amendment 85 include (1) adjusting the jig trimester apportionment to put more fish in the

A season, (2) establishing a new hook-and-line CV halibut PSC category that enables longline CVs to fish in the summer months, and (3) a new hierarchy of potential rollovers. The Council felt these considerations and the resulting allocations in Amendment 85 amply addressed National Standard 8.

Response: Comment noted.

Comment 47: We support the principle of adequately funding small boat, entry-level fisheries.

Response: Comment noted.

Comment 48: Allocations to the jig and <60 ft (18.3 m) LOA fixed gear sectors were made without consideration of either the Alaska State waters fishery in which such vessels could participate or the likelihood that those Pacific cod allocations will, in fact, be utilized. A result of this over-allocation is that much of the cod non-CDQ TAC allocated to these sectors will rollover, first through various inshore fisheries, including to the trawl catcher vessel fleet; none, however, will likely ever roll back to the H&G sector. Such a result is at odds with the Amendment 85 goal of minimizing rollovers.

Response: NMFS disagrees. The State waters Pacific cod fishery was considered by the Council when the allocations to sectors were made. This fishery was established by the State to meet local needs in the area of Adak, Alaska, in the Aleutian Islands and is not readily accessible to small boat operators fishing in other coastal areas of the Bering Sea. Additionally, the purpose of Amendment 85 is to revise the allocations to

the various sectors to more closely reflect historic harvest; a goal of the amendment is to decrease rollovers, not eliminate them. The Council's purpose in giving the small boat sectors allocations greater than their histories was to encourage the growth of these entry-level sectors in accordance with National Standard 8. Since 2001, the <60 ft (18.3 m) LOA fixed gear CV sector has harvested all of its allocation and since 2002 has harvested increasing amounts of rollovers from the jig sector, including in 2006, the first year of the State waters fishery. The allocation to the jig sector is reduced under Amendment 85. Also, the amount of the reallocations from the small boat sectors is historically much smaller than the amount of the reallocations from the trawl sectors, thus supporting the Council's goal of increasing stability.

Comment 49: The non-AFA trawl CP sector was cut in order to fund a 4 percent small boat fishery. When asked by another Council member what was the rationale for the H&G allocation of 13.2 percent (as originally introduced) rather than the mid-point years' average, the maker of the motion stated "It was really how to fund that 4 percent and make the numbers work and that is my rationale for that number."While creating room and incentives for growth in the small hook-and-line and pot catcher vessel and jig fisheries was a goal of Amendment 85, the cost for doing so should not fall on only one of the most cod-dependent sectors. Shifting of cod from one of the most dependent sectors (non-AFA trawl CP) to perhaps the least runs counter to the objective of matching cod allocations with use and historical dependence.

During Council discussion on Amendment 85, the

maker of the motion stated that the trawl sector should fund the jig set-aside since the fixed gear sector had been doing that in the past. This was given as the justification for so dramatically decreasing the non-AFA trawl catcher-processor allocation (from recent use above 18 percent to an allocation of only 13.4 percent). The record does not support the assertion that the fixed gear fleet and not the trawl fleet had historically funded increases for the small boat sector. It is not clear from the record that the (proposed) jig allocation actually came from any one sector; however, if the assumption was that the new allocation percentages represented a shift in the responsibility for the jig set-aside from fixed gear to the trawl sector, then all trawl sectors should have been similarly assessed.

There was no consideration or analysis of the possibility, appropriateness, or impact of imposing the burden of funding those increases unequally. The Secretarial review draft analysis expressly acknowledges this, stating that the extra allocations to the small sector were "deducted . . . principally from the non-AFA sector amounts."It is not fair and equitable to impose the burden on the non-AFA sectors and not on the AFA sectors, particularly given the AFA's mandate to the Council to protect the non-AFA fleet from AFA encroachment in fisheries other than pollock. There was no separate analysis, or vote, on spreading the burden of the small boat incentives unequally. What is clear is that no rationale has ever been given for disadvantaging either the non-AFA sectors generally (which the Secretarial review draft analysis asserts is the group that the Council disadvantaged) or the H&G sector in particular.

The estimated cost, at 2007 TAC and 2005 harvest rates, to the H&G fleet of an estimated $46 million, or 34 percent of their annual revenues, far outweighs the benefit to a small boat fleet which has historically never harvested its allocation. We have no quarrel with the Council's decision to make those adjustments. There is no justification, however, for imposing the burden of funding them entirely or primarily upon the H&G sector.

Response: Neither the non-AFA trawl CP sector nor any other sector exclusively funded the allocation to the small boat sectors. Despite the remarks made by the Council member and based on the average historic harvest from 1995 to 2003, it would appear that neither the AFA trawl CP sector nor the non-AFA trawl CP sector funded the small boat sector allocations because the former will receive slightly above its average historic harvest and the latter will receive exactly its average historic harvest. There is nothing in the Secretarial review draft analysis addressing the impact on other sectors because there were no specific amounts taken from any particular sector to fund the small boat sectors.

For the small boat sectors to receive allocations above their average historic harvest, four sectors will receive less than their 1995 to 2003 average historic harvests: pot CV [gteqt]60 ft (18.3 m) LOA, hook-and-line CP, pot CP, and trawl CV (see paragraph seven of the response to Comment 13). The trawl CV sector is comprised of AFA and non-AFA vessels, so considering all the sectors that will receive an allocation below their average historic harvest, most of them are non-AFA sectors. The non-AFA sectors are not disadvantaged,

they merely outnumber the AFA sectors by a ratio of eight to one.

Comment 50: The Council made a policy decision to deviate from its stated goal of conforming actual use and dependency by allocating to the jig and <60 ft (18.3 m) LOA fixed gear CV sectors a combined 2.4 percent above their historic harvest of the Pacific cod TAC. Assuming that the Council would be justified in shifting that 2.4 percent to those sectors because of the predicted salutary impact on coastal communities and related economic and social consequences, it is not legitimate to take that 2.4 percent entirely from other non-AFA sectors. In the analysis for Amendment 85, the potential impact of providing the small boat sectors with an allocation above their actual use and dependency was limited to a scenario in which the extra shares needed to fund that incentive were taken from all other sectors proportionally; no analysis was made of the disproportionate impacts that would result from the scenario, eventually chosen by the Council, of taking that extra 2.4 percent exclusively from non-AFA sectors.

Response: The Pacific cod allocations for the jig and <60 ft (18.3 m) LOA fixed gear sectors did not come exclusively from any particular sectors. As explained in the response to Comment 49, several sectors received less than their 1995 to 2003 average historic harvest of Pacific cod to fund the small boat sectors.

Comments on Reallocations

Comment 51: Amendment 85 will not resolve the reallocation issues raised in the problem statement

created by the Council for the action. By over-allocating cod to small, shore-based fisheries that have a history of under-fishing current allocations, and ignoring the important aspect of Alaska's creation of a state waters fishery, this action insures continued rollovers at or above current levels.

Response: The problem statement does not seek to eliminate inseason reallocations, but to decrease them by adjusting Pacific cod allocations to better reflect historic use by sector. Historically, 76.6 percent of the reallocations between 2000 and 2004 resulted from the trawl sectors *not* harvesting their entire allocations, with a much smaller amount of unharvested Pacific cod coming from the small, shore-based fisheries. Based on this information, NMFS determined that the new allocations to the sectors will reduce reallocations in the future. Also, see response to Comment 48.

Comment 52: NMFS will likely set the incidental catch allowance for the non-AFA trawl CP sector higher than the anticipated need, to ensure that there is enough Pacific cod available to fund other sector fisheries. The cod which is not used in the incidental catch allowance will probably not be enough to fund a separate (late-season) directed fishery, so will roll over to another sector. This will continue the very situation (rollovers) which Amendment 85 was supposed to fix. In effect, the H&G sector loses cod allocation well beyond the amounts that were rolling over in the past, and the allocation scheme ensures that more fish will roll over in the future.

Response: As explained in response to Comment 48, Amendment 85 was not intended to eliminate rollovers.

Under this final rule, NMFS will create an incidental catch allowance for the non-AFA trawl CP sector to use for Pacific cod caught incidentally in its other directed fisheries. Because the non-AFA trawl CP sector tends to target Pacific cod early in the year, NMFS will estimate an incidental catch allowance early in the year in order to close the sector's directed fishery while there is enough of the sector's Pacific cod allocation remaining for incidental catch in the other non-AFA trawl CP groundfish fisheries. Whether the allowance is set too high will depend on how well the non-AFA trawl CP sector can avoid Pacific cod incidental catch in its other fisheries. If the sector can lower its incidental catch rate, the directed fishery will have more Pacific cod available for its target fishery. Pacific cod still may be harvested and retained once the directed fishery is closed, albeit at the lower rate of 20 percent under MRA regulations. A large portion of the Pacific cod harvest in this sector historically has been taken as incidental catch. This trend is expected to continue until vessels are able to form cooperatives and opportunities to change fishing strategies present themselves.

The commenter presents only one scenario. NMFS anticipates that without cooperatives, the Pacific cod fishery will be prosecuted much as it has been in the past. NMFS will do its best to ensure that each trawl sector can fully harvest its allocation. If the non-AFA trawl CP sector can reduce its incidental catch of Pacific cod, it may be that the incidental catch amount will be greater than the sector's needs, but not large enough for another directed fishery.

A goal of Amendment 85 is to reduce reallocations, not eliminate them. NMFS has determined that the

allocations will result in lower amounts of reallocations from all sectors. If Amendment 80 is implemented by January 1, 2008, NMFS will manage Pacific cod for the non-AFA trawl CP sector in accordance with Amendment 80.

Comment 53: The current allocations (from the 1995 action) do not reflect actual catch by sectors of BSAI Pacific cod, principally due to rollovers of uncaught allocations from the trawl and jig sectors. The trawl sectors consistently have not caught their allocation which has resulted in rollovers from the trawl sectors to the fixed gear sectors every year since 1995 - both before and after SSL mitigation measures. The average rollover from the trawl sectors has been 16,765 mt per year (1995 - 2005). At the same time, the freezer-longliners are the only sector that consistently caught their entire allocation on an annual basis. Since 1995, the freezer-longliners have also been catching the majority of the rollover from the trawl sectors and uncaught allocations from other sectors as well (jig, pot, etc.).

Response: The EA/RIR/FRFA contains the data concerning this issue in Table 3-24 and it represents the best scientific information available on the subject.

Comment 54: The increasing trend in the fixed gear allocation is a reflection of trawl rollovers. Trawl sectors have not caught their allocations for a number of reasons, one of which is halibut PSC mortality. From 1995 to 2005, the combined trawl sectors caught a decreasing amount of Pacific cod while increasing the rate of halibut PSC mortality by 47 percent (mt halibut PSC per mt Pacific cod). During the same time period,

the hook-and-line sectors were catching an increasing amount of Pacific cod while decreasing the rate of halibut PSC mortality by 31 percent. In 2005, the trawl rate was 3.4 times higher than the hook-and-line rate (mt halibut PSC per mt Pacific cod).

Response: The EA/RIR/FRFA examines reallocation among gear types in Section 3.3.5.7 and it represents the best scientific information available on the subject.

Comment 55: NMFS should disapprove the rollover (reallocation) hierarchy contained in the proposed rule because the inshore sectors already have healthy allocations and would be first in line for the rollovers. NMFS should send this portion of Amendment 85 back to the Council with instructions to give non-AFA trawl CPs priority access to the rollovers from the jig and <60 ft (18.3 m) LOA fixed gear sectors.

Response: NMFS has determined that the reallocation hierarchy proposed by the Council is consistent with the purpose and need for Amendment 85 and that it is consistent with the Magnuson-Stevens Act and other applicable law and has approved it with this final rule. This reallocation hierarchy is consistent with the Council's decision to increase the harvest opportunities for the fleets that deliver shoreside to coastal fishing communities, a consideration under National Standard 8.

Comment 56: Prioritizing rollovers to the AFA trawl CP sector would help accomplish the Council's goal of "maximizing to the extent practicable" the opportunity for the AFA trawl CP sector to conduct its directed cod fishery at the beginning of the year. Knowing that the

surplus "C season" cod that has traditionally rolled over from the AFA trawl CP sector during the last half of the fishing year would be available to support nontarget needs in the AFA trawl CP sector during the pollock A and B seasons would help facilitate inseason incidental catch management so as to permit full funding of the directed cod fishery that one AFA trawl CP vessel conducts early in the year.

Response: See response to Comment 55 which is applicable to the AFA CP sector as well as the non-AFA CP sector. Also see the responses to Comments 13 and 25 for more information regarding the AFA trawl CP sector allocations.

Comments on Process Followed for Adoption of Amendment 85

Comment 57: The Council's action was taken too quickly for the regulated community to provide informed public comment. The process for consideration of Amendment 85 made it difficult, if not impossible, for the public to comment effectively on, or the Council to understand the impacts of, the decisions it was making. The Magnuson-Stevens Act generally prescribes that a regional fishery management council will hold public hearings in conjunction with the FMP amendment process. See 16 U.S.C. 1852(h)(3). The law also provides for a separate opportunity for "interested persons" to make comment at "business meetings of a Council."

Response: The public was provided ample notice and opportunity to comment on Amendment 85 in accordance with APA and Magnuson-Stevens Act procedures. The public had several opportunities to

comment on Pacific cod sector allocations at Council meetings prior to the Council's final action in April 2006 and during the comment period on the FMP amendment. The December 2004 Council meeting was the first opportunity the public had to comment specifically on Amendment 85 at the first presentation of the discussion paper for Amendment 85. Amendment 85 was on the agenda of every Council meeting from December 2004 until final action in April of 2006, for a total of eight Council meetings. The Federal Register notice for the April 2006 Council meeting included a statement that final action would be taken on Amendment 85. A draft analysis of Amendment 85 was prepared by the Council and made available for public review prior to the Council taking action. The analysis was then further refined to reflect the effects of the Council's action prior to submission for Secretarial review.

Comment 58: The non-AFA trawl CP sector lacked the opportunity to discern and explain the implications of the Council's actions before the Council's final decision making. As a result, the non-AFA trawl CP fleet focused its public testimony in support of options that best mirrored the sector's recent use and dependence. The first indication that the Council was developing an option that included a non-AFA trawl CP sector allocation that was at the lowest end of the range under consideration and heavily weighted pre-full retention and pre-AFA years, came when the Council began their deliberations. No further public comment was allowed before final action, however. The non-AFA trawl CP sector has no representation on the Council. Without the benefit of an H&G representative on the Council to participate in the deliberations, the Council members

cannot and clearly did not fully realize the impact of their actions. The result was the non-AFA trawl CP fleet was denied a reasonable opportunity to discern and explain the implications of the Council's proposed action before final action was taken.

Response: There were many opportunities for the public to comment on Amendment 85 (see the response to Comment 57). Several allocation options were presented in the draft analysis that was released to the public in March 2006. These options included allocations to the non-AFA trawl CP sector that ranged from 12.7 to 16.2 percent of the non-CDQ BSAI Pacific cod TAC. The April draft of the EA/RIR/IRFA presented the Council with the information it needed to make the allocation decisions in various tables, with more information on fishmeal presented to the Council and the public at the April Council meeting before public testimony and final action by the Council. After receiving public comment, the Council chose the option to select percentages for Pacific cod allocated to each sector that fell within the range of percentages analyzed. Please see the response to Comment 3 for an explanation of the consideration of catch history from 1995 through 2003. No year was weighted more heavily than any other. Only the first three years of history out of a total of nine years considered were before full retention and the AFA. Not having a representative on the Council should not negatively impact a sector. The Council members take a sworn oath to manage in the best interests of all and are to act impartially.

Comment 59: No preliminary preferred alternative was identified by the Council. As a result, the analysts, public, and the Council did not have the opportunity to

fully understand, comment on, and evaluate the impacts of Amendment 85. Identifying a preliminary preferred alternative before final action may not be required, but for complicated actions it should be.

Response: As the commenter notes, the Council was not required to identify a preliminary preferred alternative before taking final action on Amendment 85. The analysis before the Council in April 2006 provided the Council and the public with the information necessary for final action on Amendment 85. Each option under consideration for each component was fully analyzed and when an option in one component may have affected options under consideration in another component, those impacts were identified and explained in such a way that the Council and the public could understand the impacts of its decision. For example, seasonal allowances were changed to maintain to the extent possible the current percentage of non-CDQ Pacific cod TAC available for harvest in the early part of the year when fishing for Pacific cod is more advantageous. NMFS notes the commenter's statement that a preliminary preferred alternative should be identified by the Council prior to taking final actions that are complicated.

Comment 60: The Amendment 85 decision making process was rushed, its analyses were inadequate, and the impacts of the Council decision were not well understood. When the Council chose the "mix and match" approach instead of a "packaged alternative" and moved directly to final action, rather than selecting its desired allocation as a preliminary preferred alternative for further analysis and public comment, the Council basically acted without understanding the

impacts of this decision. When one aggrieved stakeholder was able to convince Council members that it suffered from certain unintended consequences, the Council took the matter up again to institute a discrete fix for one vessel. However, the law requires that all members of the public have an opportunity to understand the impacts of a proposed action and an equal opportunity to be heard in the process.

As originally passed, the Council recommended that Amendment 85 allocate the H&G sector an amount of Pacific cod that was just over its average harvest, 13.7 percent during the 1995-2003 period. The telling fact that this process devolved into a matter of political compromise rather than informed decision making, in violation of National Standard 2, was that the Council decided to reconsider final action upon discovery of an "unintended consequence." Expressing concern that the 1.5-percent allocation chosen for the AFA catcher-processor sector might disproportionately impact the one vessel in that sector that targets cod (notwithstanding the recent use of that sector in the range of 1 percent), the Council voted to increase the AFA catcher-processor sector's allocation to 2.3 percent. Part of the Pacific cod that went to "fund" that increase came from the H&G sector, which ended up with a reduced allocation of just 13.4 percent.

This action should also have been analyzed in light of the statutory protections the American Fisheries Act grants to non-pollock fisheries. Such weighing and analysis was lacking in this instance. There was no opportunity for public input during the reconsideration and the Amendment 85 allocation was made without the Council having made a reasonable record of how the

allocation it chose for the AFA sector "protects" the non-AFA fleets. Further, this allocation exceeds the AFA catcher-processor sector's current use (i.e., since 2001) by as much as 90 percent. It was incumbent upon the Council to make a good-faith effort to examine and fulfill its duties to the non-AFA sectors that funded this reallocation. That was not done. The stated rationale for the revision was the (highly questionable) bycatch needs of the AFA trawl CP sector. At the very least the non-AFA trawl CP fleet had far greater bycatch needs that were ignored not only in Amendment 85 and in Council discussion but were exacerbated once a table using fishmeal was presented during the Council discussion, but not analyzed in the EA/RIR/IRFA, surfaced. But no opportunity was allowed for public comment at that point, and there is no non-AFA trawl CP sector representative on the Council who would have been in a position to alert Council members to the disparity.

We support full Secretarial disapproval of the amendment based on lack of adequate analysis which resulted in the Council not fully understanding the impact of their actions, and based on the fact that the Council action did not take the non-AFA trawl CP recent history into consideration. The ultimate impact has been to jeopardize the viability of the H&G fleet, in particular, the vessels which are heavily reliant on cod.

Response: The public was notified that final action on Amendment 85 would be taken at the April 2006 Council meeting (see response to Comment 57). A draft analysis was prepared prior to that meeting. Because there were questions about including Pacific cod that was turned into fishmeal as the primary product in the

calculations of retained legal harvest, tables showing that information were passed out at the Council meeting (see response to Comment 2) prior to public testimony and the Council's deliberation, so the public had an opportunity to respond to the information. The fishmeal data were included in the Secretarial review draft analysis. The Council and NMFS consider fishmeal to be part of the retained legal harvest for Pacific cod. Fishmeal is the primary product from the AFA trawl CP sector's incidental catch of Pacific cod. To exclude it from the AFA sector's history would be equivalent to excluding the non-AFA trawl CP's sector's incidental catch history from its other fisheries. Excluding fishmeal from the AFA trawl CP sector's harvest would result in a harvest share of 0.8 percent, or 65 percent below this sector's new allocation, not 90 percent. Catch history was calculated over a number of years, not just one or two recent years. The Council chose allocations from the within the range of percentages analyzed to balance catch history with consideration of socioeconomic and community factors, including allocations to the small boat sectors that were above their average historic harvest. Members of all sectors and the public at large have had an equal opportunity to comment on the Council's allocation decision, and their opinions have been considered, as evidenced by this response to comments section of the final rule. No procedural irregularity occurred during the development of Amendment 85. The information presented in the Secretarial review draft analysis for this action represents the most current, comprehensive set of information available, recognizing that some information, such as operational costs, is unavailable.

The original proposal before the Council was to allocate 13.2 percent of the non-CDQ Pacific cod TAC to the

non-AFA trawl CP sector. In a later motion, the jig sector allocation was cut from 2.0 percent to 1.5 percent and the non-AFA trawl CP sector allocation was increased to 13.7 percent, partly in consideration of the State waters Pacific cod fishery. This clearly shows that there were advocates on the Council for the allocation needs of the non-AFA trawl CP sector. The following day, the Council voted to reconsider its action because the AFA trawl CP "allocation of 1.5 percent was not reflective of the historic usage and that it would better lie somewhere between 2 and 2.5 percent" and "not to provide for a directed fishery for any one vessel because there is no guarantee that there will be ongoing directed fishing by any one vessel with these allocations."The increased allocation to the AFA trawl CP sector this second day resulted in a deduction from several sectors: 0.3 percent from the non-AFA trawl CP sector, 0.3 percent from the hook-and-line CP sector, 0.1 percent from the jig sector, and 0.1 percent from the pot CV sector. As explained in previous responses, NMFS has determined that these allocations are fair and meet the goals of the problem statement.

Council members are to act impartially and in the best interests of all. In fact, several members of the Council spoke on behalf of the non-AFA trawl CP sector during the Council deliberations on Amendment 85. This is one reason the original proposal of a 13.2-percent allocation to the non-AFA trawl CP was initially increased to 13.7 percent. Again, the final allocation of 13.4 percent is exactly the non-AFA trawl CP sector's average historic harvest from 1995 through 2003. Amendment 85 "protects" the non-AFA trawl CP fleet in part by separating the trawl CPs into two sectors. Also see responses to Comments 13, and 33, and 58.

Comment 61: No detailed or legally sufficient impacts analysis of the alternatives was ever prepared. Amendment 85 and its supporting analyses were simply not ready for final decision at the April 2006 meeting. Rather, they should have been further developed and a preliminary preferred alternative specified. By choosing a set of percentages in the manner that the Council did, and taking final action in the same meeting, there was no opportunity for development of a legally sufficient analysis of the likely impacts of the hybrid alternative.

The Council reserved itself the option of simply setting allocations for each sector within the range of percentages correlated with one of the baseline periods for a particular sector. However, the RIR and IRFA contained no detailed analysis of the tangible, practical impacts of these proposed allocations on the H&G fleet's fisheries and fishing strategies as they are legally required to be, and that NMFS inseason management was able to ascertain after the Council's vote on Amendment 85. The Council's deliberations regarding the factors the Magnuson-Stevens Act requires it to consider in allocation decisions was not (nor could it have been), informed by objective analysis.

The allocation and its management to the H&G sector does not meet the objectives of the Problem Statement, and the effects were not adequately analyzed in either the Amendment 85 EA/RIR/IRFA (March draft) or the Secretarial Review Draft. Nowhere is the impact of any allocation, under any year option, analyzed as to its real operational impact on the sector: the sector's need to balance target versus incidental cod, and loss of the ability to target cod or prosecute flatfish fisheries with

such a reduced allocation. With the H&G sector receiving such different treatment than other sectors, or different from what was presented in the analysis, it was virtually impossible for the sector to provide appropriate public comment. Council members did not realize the impact that such a low allocation had or the instability placed on the fleet from losing their directed fishery. Nor did they know the effect on the sector's ability to attain certain groundfish retention levels. These changes happened in the Council deliberations, so the sector could not comment. Without such analysis, and without H&G representation on the Council, Council members did not make an informed decision.

The CDQ Pacific cod allocation increase from 7.5 percent to 10.7 percent and the State of Alaska 3 percent share of the ABC will affect Amendment 85's ability to minimize reallocations, and to correlate each sector's allocation with dependency and use. The amendment should be only partially approved or there should be a mandate to review the action in the near future to determine how well the problem statement was addressed.

Response: As is the normal procedure, a draft EA/RIR/IRFA was prepared prior to the April Council meeting and was made available to the Council and the public prior to the Council taking action on Amendment 85. The analysis was then further refined to reflect the effects of the Council's action prior to submission for Secretarial review. Impacts on the non-AFA trawl CP sector and all the other sectors were well analyzed prior to Council's final action and expanded upon in the analyses that were released for public comment with the FMP and the proposed rule. The analysis and other

materials provided to the Council before it took final action were more than adequate and the Secretarial review draft analysis is legally sufficient. As stated in the IRFA, "Because this action is principally designed to 'reapportion' access to the cod resource among current user groups (at the 'sector level'), by definition, it represents tradeoffs."

The Secretarial review draft analysis expects that "management of a lower Pacific cod allocation [to the non-AFA trawl CP sector] to serve both directed and incidental catch needs, will be substantially more difficult," without a cooperative structure as approved in Amendment 80. The non-AFA trawl CP sector will receive exactly its average historic harvest. This is lower than its more recent harvests, so if the sector reduces incidental catch of Pacific cod in other directed fisheries, it will have more Pacific cod available for its directed fisheries. However, the non-AFA trawl CP sector did not receive "different treatment than other sectors, or different from what was presented in the analysis" beyond dealing with issues unique to its sector, all of which was presented in the Secretarial review draft analysis. In determining the average historic harvest of the AFA trawl CP sector, the Council chose not to include the history of nine AFA vessels (AFA 9) that were bought out under the AFA, the history of which was included when its Pacific cod sideboard was created. Therefore, under Amendment 85, the AFA trawl CP sector will have an allocation that is substantially below its former Pacific cod sideboard allocation that included AFA 9 history. By excluding from consideration the AFA 9 history, which was extinguished by section 209 of the AFA, and by separating the two sectors, Amendment 85 protects the

non-AFA trawl CPs. These two sectors will no longer be sharing a single allocation that would be lower under Amendment 85 if the sectors were left together with the same sideboard for the AFA trawl CPs.

The Council took note of a possible legislated increase in the Pacific cod allocation to the CDQ Program (see response to Comments 74 and 75) and of the State waters Pacific cod fishery (see response to Comment 48) when it took final action. NMFS has determined that the problem statement was well addressed by the Council.

Comment 62: Because the analytical and public comment processes were short-circuited, the Council's decision was uninformed and arbitrary, based more on compromise than a reasoned consideration of the relevant Magnuson-Stevens Act factors and the purposes which the Amendment was intended to serve. The analysis available to the Council at the time of decision making, as well as the decision making record, is devoid of any empirical, analytical linkage between the allocation scheme chosen and the Magnuson-Stevens Act standards Congress requires a council to consider when allocating fishing privileges. The Magnuson-Stevens Act and Amendment 85 itself specify goals and requirements for this Pacific cod allocation scheme but the Council's cursory and flawed deliberative process on Amendment 85 failed to connect the Council's choices with these goals and requirements. Accordingly, the action taken by the Council on Amendment 85 represents arbitrary and capricious decision making, in violation of the Magnuson-Stevens Act and the APA. The Magnuson-Stevens Act establishes standards with respect to the

relevant criteria a fishery management council must consider when, as here, it makes resource allocations. Specifically that sectors of industry are treated equally, that residents of different States are treated equally, that socioeconomic concerns are taken into consideration, that fisheries are managed to optimum yield, that allocations are for the net benefit of the Nation, current participation, historical use, dependence on the fishery, and other factors. The APA requires that the impacts of Federal regulations be understood and considered at the time decisions are made. The Council's cursory and flawed deliberative process on Amendment 85 failed to connect the Council's choices with these goals and requirements (under administrative law precepts). Accordingly, the action taken by the Council on Amendment 85 would be arbitrary and capricious decision making if implemented.

Response: The analytical and public comment processes for Amendment 85 and this final rule were not short-circuited, as explained in response to Comment 57. The Council discussed its action in some depth with various allocation amounts presented before final action was taken, including how the Magnuson-Stevens Act National Standards were met by Amendment 85. The impacts of Amendment 85 were discussed in the analysis available to the Council and to the public before the April 2006 Council meeting. The Council's decisions were guided by its problem statement which specified the factors that would be considered in its allocation decisions. The draft EA/RIR/IRFA addressed the Magnuson-Stevens Act requirements and the Council fulfilled these requirements. The allocations chosen were within the options considered in

the draft analysis. Decisions by NMFS on FMP amendments and proposed regulations recommended by the Council must be consistent with the Magnuson-Stevens Act and APA. NMFS has determined that Amendment 85 meets all APA and Magnuson-Stevens Act requirements (see response to Comment 57).

Comment 63: The EA/RIR/IRFA states that the non-AFA trawl CP fleet does not target on pollock because the headed and gutted pollock sells for less than the cost of production. This is inaccurate. While the price of H&G pollock has been low in the past, there were several H&G vessels that had a viable pollock target and market prior to the AFA. Since the AFA, the value of H&G pollock has increased dramatically and the fleet has suffered from not having access to this vast and valuable resource, which comprised 75 percent of the total allowable 2 million mt catch in the BSAI in 2006.

Response: The statement in the EA/RIR/IRFA was in reference to the fleet in the GOA. Given the comment, NMFS determined the statement was confusing and revised the final analysis by removing the statement.

Comment 64: The Amendment 85 package provided for Secretarial review not only inadequately estimates the impact on the non-AFA trawl CP fleet of its dramatically reduced allocation but primarily cites Amendment 80 cooperative provisions as the tool that will help mitigate the adverse impacts of Amendment 85 and allow the sector to gain the most value out of its reduced Pacific cod allocations. This seems to violate the principal of evaluating the impacts and providing the rationale for the current proposed amendment without relying on a future action not yet implemented.

Response: NMFS cannot find support for the commenter's assertion that the Amendment 85 package submitted to the Secretary primarily cites Amendment 80 cooperative provisions as justification for approval of Amendment 85. The response to Comment 13 explains how the analysis for Amendment 85 and this final rule adequately present information concerning the impacts of the action on all sectors, including the non-AFA trawl CP sector. NMFS partially approved Amendment 85 based on the record for Amendment 85 and not on any possible future actions that might mitigate its impacts.

Comment 65: NMFS cannot now substitute post hoc rationalizations for the absent Council deliberation based on informed public participation on these central issues. The Council's decisional record for Amendment 85 lacks the required support for the recommendations the Council made.

Response: NMFS is required to examine and consider the entire record before making a decision whether to approve, disapprove, or partially approve an action recommended by a council. After considering the entire record developed for Amendment 85 and the proposed rule, NMFS decided to partially approve Amendment 85 and partially approve the proposed rule for reasons provided in this preamble.

Comment 66: By allocating cod based on rates of harvest that stretch back as far as 1995, while ignoring current use and dependence of the H&G sector, Amendment 85, as recommended by the Council, violates the substantive provisions of the Magnuson-Stevens Act (factors to take into account when

allocating fishing privileges).

Response: National Standard 4 requires allocations to be (1) fair and equitable, (2) reasonably calculated to promote conservation, and (3) carried out in such manner than no particular individual, corporation, or other entity acquires an excessive share. In compliance with the requirement that the allocation be fair and equitable, the Council used catch history from 1995 through 2003. The Council also considered more recent catch history from 2004 and 2005, but chose not to develop allocations including that history. (See response to Comment 3.) The Council took into account current use and dependence of the non-AFA trawl CP sector, and all other sectors, in making its allocation recommendations, but ultimately did not use them exclusively. Nothing in the Magnuson-Stevens Act or other applicable law requires the Council or NMFS to develop allocations that include present participation, just that the information be considered and a reasonable explanation provided if it is excluded. Socioeconomic considerations and community factors, such as favoring the small boat fisheries, also were considered. Also see responses to Comments 3 and 48.

Comment 67: The commenter believes that Amendment 85 is consistent with the National Standards of the Magnuson-Stevens Act and other applicable law. The resulting sector allocations from Amendment 85 take into account the catch history, historic dependence, and ability to engage in other fisheries by each of the sectors. Consideration was also given to the potential impacts and sustained participation of coastal communities and small-boat fishermen.

Response: NMFS agrees that Amendment 85 as partially approved by NMFS is consistent with the Magnuson-Stevens Act and other applicable law. The remaining comments are noted.

Comment 68: The allocations in Amendment 85 were the result of a fair and equitable process and did not discriminate by residency.

Response: Comment noted.

Comment 69: Amendment 85 is consistent with the Problem Statement and purpose of the action.

Response: Comment noted.

Comment 70: Keep the proposed rule/final rule process moving forward on the regulatory track so that Amendment 85 can be implemented prior by January 1, 2008 (i.e., in place for the 2008 season), because revisions to the allocations are long overdue.

Response: This final rule will be published in sufficient time to be effective on January 1, 2008.

Comments on Prohibited Species Catch Allowances

Comment 71: The Secretary should disapprove the PSC allocation portion of Amendment 85. Amendment 85 would allocate PSC for Pacific cod separately to each trawl sector for use only in the Pacific cod fishery. Any sector which has PSC remaining after the cod fishery is completed will be unable to use it anywhere else. Sectors with sufficient PSC to harvest their cod allocation will have no incentive to use it carefully;

there would be little incentive for minimizing bycatch rates in other sectors and could result in increased PSC use, in violation of National Standards 1 and 9 of the Magnuson-Stevens Act. After the H&G sector prosecutes its Amendment 85 directed cod fishery, which NMFS estimates will last only about 10 or 11 days, there still may not be enough cod and associated prohibited species catch (PSC) of halibut and crab for the H&G sector to fully prosecute its other directed groundfish fisheries. Non-AFA trawl CPs will not be able to fund their PSC needs from other PSC allocations (e.g., from the yellowfin sole fishery group) because there will not be enough available. NMFS inseason management could re-allocate unused PSC to other sectors, but that would occur late in the year when it clearly was not going to be used, and would likely be too late for it to be effectively used by other trawl sectors. NMFS can simply continue to manage PSC in the trawl sectors as it does now to optimize the total catch in all trawl fisheries.

Response: NMFS did not approve the proposed apportionment of Pacific cod trawl fishery halibut and crab PSC allowances among the trawl sectors for the reasons discussed above under the section "Element of Proposed Rule Not Approved."NMFS did approve the hook-and-line PSC apportionment. Additionally, a detailed response to comments regarding the non-AFA trawl CP sector's directed Pacific cod fishery and incidental catch of Pacific cod is provided in response to Comments 13, 42, and 52.

Comment 72: The PSC sideboard allocation specified for the AFA trawl CP sector's Pacific cod fishery should be treated as a "cap" or "limit" on PSC usage in the

sector's directed Pacific cod fishery--not as an allocation to that particular fishery. AFA CP sideboards on PSC species are not currently apportioned among target species. None of the AFA trawl CP PSC should be allocated in a way that might result in any of that PSC allocation being "stranded" in a particular fishery and unavailable to support other non-pollock target fisheries in which the AFA trawl CP sector's vessels may want to participate (e.g., yellowfin sole).

Response: NMFS did not approve the proposed halibut and crab PSC apportionments for the trawl sectors. Additional explanation for this decision is provided earlier in the preamble under the section "Element of Proposed Rule Not Approved."

Comment 73: The Secretary should disapprove the PSC allocation method contained in Amendment 85, instead allocating PSC using current methodology or the allocation method contained in Amendment 80, depending on the implementation date for Amendment 80.

Response: NMFS did not approve the proposed trawl PSC apportionments. PSC will be allocated under the current regulatory method until that method is changed by future rulemaking as described in response to Comment 72. NMFS notes that the proposed rule for Amendment 80 includes new provisions for PSC apportionments among trawl sectors.

Comments on CDQ Allocation

Comment 74: After Amendment 85 was passed by the Council, the CDQ allocation was modified by the Coast

Guard Bill and subsequently by the Magnuson-Stevens Reauthorization Act. The commenter assumes that the 10.7 percent total allocation to the CDQ Program will be analyzed in the proposed rule.

Response: The 10.7-percent allocation to the CDQ Program was analyzed in the EA/RIR/IRFA for the proposed rule and the EA/RIR/FRFA for this final rule.

Comment 75: The Magnuson-Stevens Act now requires an allocation to the CDQ Program of 10.7 percent. The Council's final action on Amendment 85 adhered to the prior 7.5 percent CDQ allocation, and the Council has taken no further action since that time. Accordingly, it is not accurate to say that the "Council" proposed a 10 percent directed fishing CDQ allowance in submitting Amendment 85 to NMFS. The only proposal upon which the Council has voted chose to leave the CDQ allowance at 7.5 percent. Council staff cannot revise the CDQ allocation proposed by the Council to bring it into compliance with existing law. The Magnuson-Stevens Act requires the Secretary under such circumstances to remand the proposal to the Council, with an explanation, so that the Council may consider what appropriate corrective action to take. The proper course at this point to resolve the problem is to decline to adopt the proposed rule and to remand the sector and CDQ Program allocations to the Council for its consideration and action pursuant to the law. A remand would permit the Council to undertake a proper analysis of the unanalyzed impact of taking a larger CDQ share, before the Council finalizes new allocations.
Response: The Council determined that no further action on Amendment 85 was needed by the Council

after the Coast Guard and Maritime Transportation Act of 2006 (Public Law 109-241; Coast Guard Act) was passed because its decision in April 2006 contemplated a Congressional adjustment to the allocations of Pacific cod to the CDQ Program. The Council's intent was that the CDQ allocation under Amendment 85 would be either 7.5 percent of the Pacific cod TAC or whatever allocation was Congressionally legislated when Amendment 85 was submitted to the Secretary for review. The Council voted to maintain the status quo level of a 7.5 percent CDQ Pacific cod allocation as its preferred alternative, but inherent in that vote was the Council's acknowledgment that legislation likely would be enacted in the coming months that would overrule whatever action the Council took on the CDQ Program allocation at its April 2006 meeting. The Council clearly recognized that legislation affecting the CDQ Program was imminent and could be enacted subsequent to its decision but before Secretarial review of Amendment 85. It was recognized during Council discussion that the proposed rule would need to accommodate any legislated increase in the CDQ allocation. The President signed the Coast Guard Act into law on July 11, 2006, after the Council selected a final preferred alternative for Amendment 85. The Coast Guard Act amendments to the Magnuson-Stevens Act included a change to make the CDQ Program Pacific cod allocation a directed fishing allocation of 10 percent upon the establishment of sector allocations (Section 305(i)(1)(B)(ii)(1)). NMFS notified the Council at its October 2006 meeting that the increased CDQ allocations required under the Coast Guard Act would have to be incorporated into Amendment 85 for it to be consistent with the Magnuson-Stevens Act, and that the changes were being incorporated into the

regulations implementing Amendment 85. The Council asked about its ability to review the changes being made to Amendment 85 to comply with the Coast Guard Act, and was advised by NOAA General Counsel that because Amendment 85 had not yet been submitted to the Secretary for review, the Council could request further review it if desired. The Council did not request further review of Amendment 85 at this meeting or at any other time prior to its submission of Amendment 85 to the Secretary.

Subsequent to the Coast Guard Act, the Magnuson-Stevens Act was reauthorized and signed into law on January 12, 2007. These more recent changes to the Magnuson-Stevens Act increase the CDQ Program's Pacific cod allocation to 10.7 percent (directed and nontarget combined) effective January 1, 2008. (Note: A provision was also included to trigger this increase in 2007 if a sector of the BSAI Pacific cod fishery forms a fishing cooperative in 2007.) In accordance with section 304(b)(1)(B) of the Magnuson-Stevens Act, NMFS determined that the originally submitted proposed rule for Amendment 85 that contained a 10 percent Pacific cod CDQ Program allocation with an additional amount for incidental catch was inconsistent with the Magnuson-Stevens Act, and returned it to the Council to be revised. Thus, the proposed rule was revised to contain regulatory amendments to increase the CDQ Pacific cod allocation to 10.7 percent to be consistent with the Magnuson-Stevens Act. The increased allocation of Pacific cod to the CDQ Program was within the allocations to the Program analyzed in the March draft of the EA/RIR/IRFA.

Although the revised submission from the Council of

the proposed rule for Amendment 85 incorporated these new changes, the FMP language could not be changed because it had already been published and was available for public comment. Therefore, NMFS did not approve those parts of the FMP amendment that are now inconsistent with the Magnuson-Stevens Act and refer to a 10-percent allocation of Pacific cod TAC as a directed fishing allowance to the CDQ Program, specify the creation of an incidental catch allowance of Pacific cod for the CDQ Program, or reference changes to the CDQ Program Pacific cod allocations through the Coast Guard Act. Amendment 85 as approved by NMFS and the regulations in this final rule rely on the Magnuson-Stevens Act requirement for a 10.7 percent allocation of Pacific cod TAC to the CDQ Program rather than a specific FMP provision.

See response to Comment 74 regarding the analysis of the 10.7-percent allocation of Pacific cod to the CDQ Program.

Comment 76: The loss of Pacific cod TAC to the CDQ Program is felt by all sectors, but it is not felt proportionately to recency or dependency. Additionally, 93 percent of the CDQ cod is directed to their freezer longline partners, and half of that fleet is involved in harvesting CDQ. Therefore they get the bulk of it back as a sector, and half the sector benefits.

Response: Because the CDQ Program allocation of Pacific cod is subtracted from the Pacific cod TAC before any allocations are made to the non-CDQ sectors, all non-CDQ sectors are affected proportionately by the CDQ Program allocation. NMFS acknowledges that many of the same hook-and-line CP

vessels that fish the non-CDQ BSAI Pacific cod fishery partner with the CDQ groups to prosecute the BSAI Pacific cod CDQ fishery. While some participants in the hook-and-line CP sector will have access to the increased CDQ cod quota and receive some benefit from the harvest of CDQ cod, the cost of the royalty payment to the CDQ groups, and other program requirements, such as 200 percent observer coverage, reduce the benefit to the non-CDQ hook-and-line CP sector.

Comments on Hard Cap Management of Pacific Cod Incidental Catch Allowances

Comment 77: We support NMFS's management of the trawl sector's incidental catch allowance as outlined in the proposed rule, which is that inseason management manages each trawl sector to a soft cap. The non-AFA trawl CP sector testified in support of hard cap management, however it did so in a truly different context. It was inconceivable that the fleet would be so disenfranchised from its last seven years of catch history share. We respectfully request disapproval of hard cap management for the non-AFA trawl CP fleet and soft cap management of Pacific cod H&G incidental catch allowance under both Amendment 85 and Amendment 80.

Response: Although representatives of the non-AFA trawl CP sector may have testified in support of hard cap management of their Pacific cod allocation, the Council did not include such a requirement in their final action on Amendment 85. Therefore, Amendment 85 and this final rule do not include such a provision. NMFS will continue soft cap management of incidental catch of Pacific cod for the non-AFA trawl CP sector

under this final rule. However, NMFS notes that Amendment 80 as approved by the Secretary includes hard cap management requirements.

Comment 78: The non-AFA trawl CP sector allocation will be managed more conservatively than other sector allocations, i.e., a "hard cap" allocation that when reached will prohibit further fishing in the BSAI. The action on Amendment 85 should not be predicated on mitigation from Amendment 80. The Secretary should disapprove that portion of Amendment 85 that specifies that the non-AFA trawl CPs will be managed under a hard cap.

Response: Neither Amendment 85 nor this final rule require that the non-AFA trawl CP sector's Pacific cod allocation be managed as a hard cap. See response to Comment 77. Also see response to Comment 64 that NMFS' Amendment 85 decision did not rely on Amendment 80 for mitigation.

Comment on Commercial Fisheries

Comment 79: All quotas allocated should be cut in half this year and all quotas should continue to be cut by 10 percent in each succeeding year. The figures that show healthy stocks gained from the commercial fishing profiteers are a conflict of interest for them because they financially gain from telling this agency everything is great. Ban bottom trawling entirely now.

Response: NMFS conservatively manages the BSAI Pacific cod fishery based on the best scientific information available. To ensure conservation of the resource, the status of the Pacific cod stock is reviewed

by NMFS and the Council each year through a public scientific review process before the TAC is allocated. The commercial fishing industry does not set the harvest levels. This action is intended to allocate Pacific cod TAC among various gear groups. NMFS reviewed the impacts of Amendment 85 in the EA/RIR/FRFA and concluded that it would not result in a significant impact on the human environment. This action is not intended to ban specific gear types. Banning trawling or reducing harvests are not the goals of this action and would need to be addressed in a separate regulatory action developed through the Council process.

Classification

The Acting Administrator, Alaska Region, NMFS, determined that Amendment 85 is necessary for the conservation and management of the Pacific cod fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS' responses to those comments, and a summary of the analyses completed to support the action The need for and objectives of this action are contained at the beginning of the preamble and in the SUMMARY section of the preamble. The legal basis for this action is also contained in the preamble. A summary of the FRFA follows. A copy of this analysis is available from

NMFS (see ADDRESSES).

No comments were received that raised significant issues in response to the IRFA specifically, therefore, no changes were made to the rule as a result of comments on the IRFA. However, several comments were received on the economic impacts of Amendment 85 on different sectors of the industry. For a summary of the comments received, refer to the section above titled "Comments and Responses." In response to public comment, one sentence was removed from the RIR regarding the non-AFA trawl CP sector targeting pollock because it was an ambiguous statement that related to activity in the Gulf of Alaska and the statement has no bearing on any decision in the analysis. Additionally, NMFS did not approve the proposed regulatory change that would have subdivided among trawl sectors the annual PSC limits apportioned to the Pacific cod trawl gear fisheries. The reasons are discussed above under the section "Element of Proposed Rule Not Approved" and include: (1) the Council did not provide any explanation as to why an additional reduction in this sector's harvest of Pacific cod and other target species that would result from a reduction in its halibut and crab PSC is appropriate or consistent with National Standard 4 or other applicable law, (2) the amount of PSC allocated to the AFA trawl CP and the trawl CV sectors is much greater than their historical needs and may create a disincentive for these sectors to minimize their bycatch of prohibited species, which is not consistent with National Standard 9, and (3) the non-AFA trawl CP sector harvests a significant majority of species other than pollock and Pacific cod, and would likely not have PSC remaining from its Pacific cod

fishery to use to achieve optimum yield from its other BSAI groundfish fisheries, an inconsistency with National Standard 1.

Description and Estimate of Number of Small Entities to which the Rule will Apply

For purposes of the Regulatory Flexibility Act, the Small Business Administration (SBA) has established that a business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual gross receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

Because the SBA does not have a size criterion for businesses that are involved in both the harvesting and processing of seafood products, NMFS has in the past applied and continues to apply SBA's fish harvesting criterion for these businesses because CPs are first and foremost fish harvesting businesses. Therefore, a business involved in both the harvesting and processing of seafood products is a small business if it meets the $4.0 million criterion for fish harvesting operations. NMFS currently is reviewing its small entity size classification for all CPs in the United States. However, until new guidance is adopted, NMFS will continue to use the annual receipts standard for CPs. NMFS plans to issue new guidance in the near future.

The FRFA used the most recent year of data available to conduct this analysis (2003). As stated previously, the commercial entities directly regulated by the action are divided into nine sectors for the purpose of (non-CDQ) BSAI Pacific cod allocations, and the CDQ allocation is considered a separate sector. A description of the participants in, and the eligibility requirements for, each non-CDQ sector and a description of the CDQ sector is provided in detail in the RIR.

Vessels that were considered large entities, for purposes of the FRFA, were those with individual annual gross receipts greater than $4.0 million, or those affiliated under owners of multiple vessels, contractual relationships, and/or affiliated through fishing cooperative membership (e.g., AFA) that, when combined with earnings from all such affiliated operations, had aggregate annual gross revenues greater than $4.0 million. Insufficient documentation of multiple and joint-ownership structures, contractual affiliations, interlocking agreements, etc., among vessels in the various fleets of interest, herein, exist with which to confidently estimate the number of directly regulated small (and large) entities. Thus, the FRFA is understood to likely overestimate the actual number of directly regulated small entities subject to this action.

The majority of the CVs in all gear sectors can be considered small entities under a conservative application of the existing threshold criterion. In 2003 only the AFA trawl CVs were considered large entities, as they are known to be party to a harvest cooperative system. The remaining 138 CVs of all gear types appear to meet the criterion for a small entity, as

applied by evaluating the 2003 gross revenue data on a per vessel basis. However, as just noted, little is known about the ownership structure of the vessels in the fleets. Thus, based on the best available data, the following vessels appear to meet the application of the criterion above for a small entity in 2003: 25 hook-and-line and pot CVs <60 ft (18.3 m) LOA; 22 non-AFA trawl CVs; 15 jig CVs; 6 hook-and-line CVs >60 ft (18.3 m) LOA; and 70 pot CVs >60 ft (18.3 m) LOA.

In the CP sector, the available data indicate that fewer than half meet the threshold for a small entity, as applied by evaluating the 2003 gross revenue on a per vessel basis. Thirty-one of the 81 participating vessels in 2003 had gross receipts not in excess of $4.0 million. Again, because little is known about the ownership structure of the vessels in the fleets, it is likely that the FRFA overestimates the number of small entities. Thus, based on the best available data, the following vessels meet the application of the criterion above for a small entity in 2003: 24 hook-and-line CPs; 4 non-AFA trawl CPs; and 3 pot CPs. In sum, of the 310 vessels participating in 2003, 169 vessels are estimated to be small entities directly regulated by the action.

The six CDQ groups participating in the CDQ Program are not-for-profit entities that are not dominant in the overall BSAI fishing industry. Thus, the six CDQ groups directly regulated by the action are considered small entities or "small organizations" under the RFA. Therefore, under a conservative application of the SBA criterion and the best available data, the total number of small entities directly regulated by the action is estimated as 175.

Recordkeeping and Reporting Requirements

This regulation does not impose new recordkeeping or reporting requirements on the directly regulated small entities.

Description of Significant Alternatives

A FRFA should contain "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."

The FRFA analyzed the "no action" alternative (Alternative 1) and the selected action (Alternative 2). Each of these alternatives was comprised of the same set of eight components, or issues. The eight components are discussed in detail in the RIR. Alternative 1 would continue the following: (1) the current overall gear allocations in the BSAI Pacific cod fishery that were established under Amendment 46 in 1997; (2) the current CDQ allocation of 7.5 percent of the BSAI Pacific cod TAC; and (3) the current apportionment of the fixed gear portion of the BSAI Pacific cod non-CDQ TAC established under Amendment 77 in 2004. Alternative 1 also would continue a shared halibut PSC allowance to the BSAI hook-and-line Pacific cod fishery category.

Before the Council made its decisions for Amendment

85, thus forming Alternative 2, it considered several options under each of the eight components. These many options are analyzed in the RIR. The combination of these options resulted in the evaluation of a multitude of potential alternatives. Amendment 85 is thus one derivation of many possible options, reflecting an effort to balance the economic and social objectives for the action against the potential burden placed on directly regulated entities (especially those which are "small"). One option was selected under each of the eight components to comprise the Council's final preferred alternative, or Alternative 2. Alternative 2 is described in detail in the RIR.

Alternative 2 was selected because it accomplishes the objective of revising allocations of BSAI Pacific cod among various harvest sectors that in general more closely reflect historical use by sector than do current allocations, thus reducing the need for reallocations during the fishing year. Alternative 2 also increases the allocation of Pacific cod to the CDQ Program as required by recent changes in the Magnuson-Stevens Act. The revised allocations will reduce uncertainty about the availability of yearly harvests within sectors that is caused by reallocations, and maintain stability among sectors in the BSAI Pacific cod fishery.

Alternative 1, no regulatory change, would have no direct impact on small entities. However, it also would not have increased the allocation to the <60 ft (18.3 m) LOA fixed gear sector, one of the smallest of the small entities, whose allocation is increased under Alternative 2. Alternative 1 would not revise allocations of BSAI Pacific cod among various harvest sectors that more closely reflect historical use by sector

than do current allocations, thus the need for reallocations during the fishing year would not be reduced. Alternative 1 also would not increase the allocation of Pacific cod to the CDQ Program, contrary to new requirements in the Magnuson-Stevens Act. Therefore, Alternative 1 would not meet the objectives of this action and was rejected.

Steps Taken to Minimize the Significant Economic Impact on Small Entities

Several measures are included in the rule that will reduce impacts on small entities. Economic opportunity and stability are facilitated for small entities participating in the Pacific cod fisheries by establishing BSAI Pacific cod allocations for the smallest of the small entities (jig vessels and the <60 ft (18.3 m) LOA hook-and-line and pot CVs) that represent a net increase over their catch history. This provides for potential growth in those sectors. On average during 1995 to 2003, the combined harvest history by these sectors was about 0.5 percent of the retained BSAI Pacific cod harvest. However, in recent years it appears that the <60 ft (18.3 m) LOA fixed gear CV sector has increased its participation in the BSAI Pacific cod fishery and could benefit from additional quota, if it were made available.

The BSAI Pacific cod fisheries are currently managed through a complex series of permits, gear and area endorsements, and licenses. Many are predicated on historical participation and/or performance thresholds (e.g., meeting or exceeding a specific threshold landing in a specific series of seasons, etc.). Many of these requirements result in extremely high entry costs and

physical barriers for small vessels and entry level operations. To relieve these burdens and obstacles to participation, an important means of accommodating small entities can be "exemptions" from these requirements such as acquiring some specific permits, and/or meeting historical catch and participation thresholds, that are extended to particularly vulnerable or disproportionately burdened classes of smaller vessels. For example, the <60 ft (18.3 m) LOA fixed gear CV sector does not need a valid licence limitation program licence to fish Pacific cod and is not required to have a Pacific cod endorsement. Recognizing the opportunity to facilitate and sustain small entity participation, the Council incorporated a number of exemptions for small entities in the final preferred action. Treatment of these provisions is provided in the RIR.

This final rule maintains the current reallocation process whereby any unused jig quota is first considered for reallocation to the <60 ft (18.3 m) LOA fixed gear CV sector before being reallocated to any other sector. The rule also changes the jig sector seasonal allowance such that 20 percent more of the jig allocation is allowed to be harvested in the first half of the year. Thus, more Pacific cod may potentially be harvested by the <60 ft (18.3 m) LOA fixed gear CV sector earlier in the year, when the weather is preferable for this small boat sector. The rule also specifies that the third trimester of the jig allocation, if it is to be reallocated, should be available to the <60 ft (18.3 m) LOA fixed gear CV sector on or about September 1. The intent of this provision is to reallocate quota between the small boat CV sectors as early in the year as possible, in order for these sectors

to have an opportunity to harvest the quota under better weather conditions.

Not approving the proposed regulatory change that would have subdivided among trawl sectors the annual PSC limits apportioned to the Pacific cod trawl gear fisheries, will help minimize the effects of the reduced allocation on the small entities that are members of the non-AFA trawl CP sector by reducing the chance that the non-AFA trawl CP sector's directed fishery for Pacific cod may be closed due to an insufficient PSC allowance.

This action increases the BSAI Pacific cod allocation to the CDQ Program from 7.5 percent of the Pacific cod TAC to 10.7 percent, as mandated by the recent amendments to the Magnuson-Stevens Act. A tradeoff exists in terms of impacts on the small entities in the non-CDQ sectors whose allocations will be reduced (proportionally by 3.2 percent) by the increase to the CDQ Program. However, the action represents a positive effect on the six small entities that comprise the CDQ groups in terms of potential revenues resulting from an increased allocation. This increase in royalty payments is estimated as approximately $1.1 million. Nonetheless, efforts to minimize the burden on the smallest of small entities, as discussed above, by exempting them from the most onerous permit and recency requirements, and by allocating Pacific cod TAC amounts in excess of their recent Pacific cod harvest levels, reflect a sincere effort to address the needs of these small entities.

In sum, many vessels in each sector directly regulated by Alternative 2 are small entities. Because this action

is principally designed to reapportion access to the cod resource among current user groups, by definition, it represents tradeoffs (i.e., some small entities could be negatively affected, while others are positively affected). In addition, the six CDQ groups will receive an increased allocation under this action.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules.

The preamble to this final rule serves as the small entity compliance guide. This action does not require any additional compliance from small entities that is not described in the preamble. Copies of this final rule are available from NMFS (see ADDRESSES) and at the following website: http://www.fakr.noaa.gov.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: August 23, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 et seq.; 1801 et seq.; 3631 et seq.; and Pub. L. 108 199, 118 Stat. 110.

2. In § 679.2, remove the definition for "AFA catcher/processor", revise the definition for "CDQ reserve", and add definitions for "AFA trawl catcher/processor", "Hook-and-line catcher/processor", "Non-AFA trawl catcher/processor", and "Pot catcher/processor" in alphabetical order to read as follows:

§ 679.2 Definitions.

* * * * *

AFA trawl catcher/processor means:

(1) For purposes of BS pollock and all BSAI groundfish fisheries other than Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, and yellowfin sole, a catcher/processor that is permitted to harvest BS pollock under § 679.4(l)(2).
(2) For purposes of BSAI Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock

sole, and yellowfin sole, a catcher/processor that is permitted to harvest BS pollock and that is listed under § 679.4(l)(2)(i).

* * * * *

CDQ reserve means the amount of each groundfish TAC apportioned under § 679.20, the amount of each catch limit for halibut, or the amount of TAC for crab that has been set aside for purposes of the CDQ Program.

* * * * *

Hook-and-line catcher/processor means a catcher/processor vessel that is named on a valid LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher/processor fishing activity, catcher/processor, Pacific cod, and hook-and-line gear.

* * * * *

Non-AFA trawl catcher/processor means, for purposes of BSAI Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, and yellowfin sole, a catcher/processor vessel using trawl gear and that:

(1) Is not an AFA trawl catcher/processor listed under § 679.4(l)(2)(i);

(2) Is named on a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher/processor fishing activity; and

(3) Was used to harvest with trawl gear in the BSAI and process not less than a total of 150 mt of Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, or yellowfin sole between January 1, 1997, and December 31, 2002.

* * * * *

Pot catcher/processor means a catcher/processor vessel that is named on a valid LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher/processor fishing activity, catcher/processor, Pacific cod, and pot gear.

* * * * *

3. In § 679.7, revise paragraph (d)(5) and add paragraph (d)(25) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(d) * * *

(5) For a CDQ group, exceed a CDQ or a halibut PSQ.

* * * * *

(25) For a CDQ group, exceed a seasonal allowance of Pacific cod under § 679.20(a)(7)(i)(B).

* * * * *

4. In § 679.20, remove paragraph (b)(1)(iv) and revise the section's introductory text and paragraph (a)(7) to read as follows:

§ 679.20 General limitations.

This section applies to vessels engaged in directed fishing for groundfish in the GOA or the BSAI.

(a) * * *

(7) Pacific cod TAC, BSAI—(i) CDQ reserve and seasonal allowances. (A) A total of 10.7 percent of the annual Pacific cod TAC will be allocated to the CDQ Program in the annual harvest specifications required under paragraph (c) of this section. The Pacific cod CDQ allocation will be deducted from the annual Pacific cod TAC before allocations to the non-CDQ sectors are made under paragraph (a)(7)(ii) of this section.

(B) The BSAI Pacific cod CDQ gear allowances by season, as those seasons are specified under § 679.23(e)(5), are as follows:

Gear Type	A season	B season	C season
(1) Trawl	60%	20%	20%
(i) Trawl CV	70%	10%	20%
(ii) Trawl CP	50%	30%	20%
(2) Hook-and-line CP and hook-and-line CV >60 ft (18.3 m) LOA	60%	40%	no C season

(3) Jig	40%	20%	40%
(4) All other non-trawl gear	no seasonal allowance	no seasonal allowance	no seasonal allowance

(ii) Non-CDQ allocations—(A) Sector allocations. The remainder of the BSAI Pacific cod TAC after subtraction of the CDQ reserve for Pacific cod will be allocated to non-CDQ sectors as follows:

Sector	% Allocation
(1) Jig vessels	1.4
(2) Hook-and-line/pot CV <60 ft (18.3 m) LOA	2
(3) Hook-and-line CV ≥60 ft (18.3 m) LOA	0.2
(4) Hook-and-line CP	48.7
(5) Pot CV ≥60 ft (18.3 m) LOA	8.4
(6) Pot CP	1.5
(7) AFA trawl CP	2.3
(8) Non AFA trawl CP	13.4
(9) Trawl CV	22.1

(B) Incidental catch allowance. During the annual harvest specifications process set forth at paragraph (c) of this section, the Regional Administrator will specify an amount of Pacific cod that NMFS estimates will be taken as incidental catch in directed fisheries for groundfish other than Pacific cod by the hook-and-line and pot gear sectors. This amount will be the incidental catch allowance and will be deducted from the aggregate portion of Pacific cod TAC annually allocated to the hook-and-line and pot gear sectors before the

allocations under paragraph (a)(7)(ii)(A) of this section are made to these sectors.

(iii) Reallocation among non-CDQ sectors. If, during a fishing year, the Regional Administrator determines that a non-CDQ sector will be unable to harvest the entire amount of Pacific cod allocated to that sector under paragraph (a)(7)(ii)(A) of this section, the Regional Administrator will reallocate the projected unused amount of Pacific cod to other sectors through notification in the Federal Register. Any reallocation decision by the Regional Administrator will take into account the capability of a sector to harvest the reallocated amount of Pacific cod, and the following reallocation hierarchy:

(A) Catcher vessel sectors. The Regional Administrator will reallocate projected unharvested amounts of Pacific cod TAC from a catcher vessel sector as follows: first to the jig sector, or to the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector, or to both of these sectors; second, to the greater than or equal to 60 ft (18.3 m) LOA hook-and-line or to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sectors; and third to the trawl catcher vessel sector. If the Regional Administrator determines that a projected unharvested amount from the jig sector allocation, the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector allocation, or the greater than or equal to 60 ft (18.3 m) LOA hook-and-line catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the hook-and-line catcher/processor sector. If the Regional Administrator determines that a projected unharvested amount from

a greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the pot catcher/processor sector in accordance with the hierarchy set forth in paragraph (a)(7)(iii)(C) of this section. If the Regional Administrator determines that a projected unharvested amount from a trawl catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the other trawl sectors in accordance with the hierarchy set forth in paragraph (a)(7)(iii)(B) of this section.

(B) Trawl gear sectors. The Regional Administrator will reallocate any projected unharvested amounts of Pacific cod TAC from a trawl sector (trawl catcher vessel, AFA trawl catcher/processor, and non-AFA trawl catcher/processor sectors) to other trawl sectors before unharvested amounts are reallocated and apportioned to specified gear sectors as follows:

(1) 83.1 percent to the hook-and-line catcher/processor sector,

(2) 2.6 percent to the pot catcher/processor sector, and

(3) 14.3 percent to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector.

(C) Pot gear sectors. The Regional Administrator will reallocate any projected unharvested amounts of Pacific cod TAC from the pot catcher/processor sector to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector, and from the greater than or equal to 60

ft (18.3 m) LOA pot catcher vessel sector to the pot catcher/processor sector before reallocating it to the hook-and-line catcher/processor sector.

(iv) Non-CDQ seasonal allowances—(A) Seasonal allowances by sector. The BSAI Pacific cod sector allowances are apportioned by season, as those seasons are specified at § 679.23(e)(5), as follows:

Sector	Seasonal Allowances		
	A season	B season	C season
(1) Trawl			
(i) Trawl CV	74 %	11 %	15 %
(ii) Trawl CP	75 %	25 %	0 %
(2) Hook-and-line CP, hook-and-line CV ≥60 ft (18.3 m) LOA, and pot gear vessels >60 ft (18.3 m) LOA	51 %	49 %	no C season
(3) Jig vessels	60 %	20 %	20 %
(4) All other nontrawl vessels	no seasonal allowance	no seasonal allowance	no seasonal allowance

(B) Unused seasonal allowances. Any unused portion of a seasonal allowance of Pacific cod from any sector except the jig sector will be reallocated to that sector's next season during the current fishing year unless the Regional Administrator makes a determination under paragraph (a)(7)(iii) of this section that the sector will be unable to harvest its allocation.

(C) Jig sector. The Regional Administrator will

reallocate any projected unused portion of a seasonal allowance of Pacific cod for the jig sector under this section to the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector. The Regional Administrator will reallocate the projected unused portion of the jig sector's C season allowance on or about September 1 of each year.

* * * * *

5. In § 679.21, remove paragraph (e)(1)(i), redesignate paragraphs (e)(1)(ii) through (e)(1)(ix) as (e)(1)(i) through (e)(1)(viii), and revise paragraphs (e)(2), (e)(3)(i), (e)(3)(v), and (e)(4), to read as follows:

§ 679.21 Prohibited species bycatch management.

* * * * *

(e) * * *

(2) Nontrawl gear, halibut. The PSC limit of halibut caught while conducting any nontrawl fishery for groundfish in the BSAI during any fishing year is the amount of halibut equivalent to 900 mt of halibut mortality.

(3) * * *

(i) General. (A) An amount equivalent to 7.5 percent of each PSC limit set forth in paragraphs (e)(1)(i) through (iv) and paragraphs (e)(1)(vi) through (viii) of this section is allocated to the groundfish CDQ Program as PSQ reserve. The PSQ reserve is not apportioned by gear or fishery.

(B) NMFS, after consultation with the Council and after subtraction of the PSQ reserve, will apportion each PSC limit set forth in paragraphs (e)(1)(i) through (vii) of this section into bycatch allowances for the fishery categories defined in paragraph (e)(3)(iv) of this section, based on each category's proportional share of the anticipated incidental catch during a fishing year of prohibited species for which a PSC limit is specified and the need to optimize the amount of total groundfish harvested under established PSC limits.

* * * * *

(v) AFA prohibited species catch limitations. Halibut and crab PSC limits for the AFA trawl catcher/processor sector and the AFA trawl catcher vessel sector will be established according to the procedures and formulas set out in § 679.64(a) and (b) and managed through directed fishing closures for the AFA trawl catcher/processor sector and the AFA trawl catcher vessel sector in the groundfish fisheries for which the PSC limit applies.

(4) Halibut apportionment to nontrawl fishery categories—(i) General. (A) An amount equivalent to 7.5 percent of the nontrawl gear halibut PSC limit set forth in paragraph (e)(2) of this section is allocated to the groundfish CDQ Program as PSQ reserve. The PSQ reserve is not apportioned by gear or fishery.

(B) NMFS, after consultation with the Council and after subtraction of the PSQ reserve, will apportion the halibut PSC limit for nontrawl gear set forth under paragraph (e)(2) of this section into bycatch allowances for the nontrawl fishery categories defined under

paragraph (e)(4)(ii) of this section.

(C) Apportionment of the nontrawl halibut PSC limit among the nontrawl fishery categories will be based on each category's proportional share of the anticipated bycatch mortality of halibut during a fishing year and the need to optimize the amount of total groundfish harvested under the nontrawl halibut PSC limit.

(D) The sum of all bycatch allowances of any prohibited species will equal its PSC limit.

(ii) Nontrawl fishery categories. For purposes of apportioning the nontrawl halibut PSC limit among fisheries, the following fishery categories are specified and defined in terms of round-weight equivalents of those BSAI groundfish species for which a TAC has been specified under § 679.20.

(A) Pacific cod hook-and-line catcher vessel fishery. Catcher vessels fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(B) Pacific cod hook-and-line catcher/processor fishery. Catcher/processors fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(C) Sablefish hook-and-line fishery. Fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of sablefish that is greater than the retained amount of any other groundfish

species.

(D) Groundfish jig gear fishery. Fishing with jig gear during any weekly reporting period that results in a retained catch of groundfish.

(E) Groundfish pot gear fishery. Fishing with pot gear under restrictions set forth in § 679.24(b) during any weekly reporting period that results in a retained catch of groundfish.

(F) Other nontrawl fisheries. Fishing for groundfish with nontrawl gear during any weekly reporting period that results in a retained catch of groundfish and does not qualify as a Pacific cod hook-and-line catcher vessel fishery, a Pacific cod hook-and-line catcher/processor fishery, a sablefish hook-and-line fishery, a jig gear fishery, or a groundfish pot gear fishery as defined under this paragraph (e)(4)(ii).

* * * * *

§ 679.23 [Amended]

6. In § 679.23, remove paragraphs (e)(6) and (e)(7).

7. In § 679.64:

A. Remove paragraph (a)(1) introductory text.

B. Redesignate paragraph (a)(1)(i) as paragraph (a)(1) introductory text.

C. Redesignate paragraph (a)(2) introductory text as paragraph (a)(1)(i).

D. Redesignate paragraphs (a)(2)(i) and (ii) as paragraphs (a)(1)(i)(A) and(B), respectively.

E. Redesignate paragraph (a)(3) introductory text as paragraph (a)(1)(ii).

F. Redesignate paragraphs (a)(3)(i) through (iii) as paragraphs (a)(1)(ii)(A) through (C), respectively.

G. Redesignate paragraph (a)(4) introductory text as paragraph (a)(1)(iii).

H. Redesignate paragraphs (a)(4)(i) and (ii) as paragraphs (a)(1)(iii)(A) and (B), respectively.

I. Redesignate paragraph (a)(5) as paragraph (a)(2).

J. Redesignate paragraph (a)(6) as paragraph (a)(3), and

K. Revise newly redesignated paragraphs (a)(1) introductory text and (a)(3).

The revisions read as follows:

§ 679.64 Harvesting sideboards limits in other fisheries.

(a) * * *

(1) How will groundfish sideboard limits for AFA listed catcher/processors be calculated? Except for Aleutian Islands pollock and BSAI Pacific cod, the Regional Administrator will establish annual AFA catcher/processor harvest limits for each groundfish species or species group in which a TAC is specified for an area or subarea of the BSAI as follows:

* * * * *

(3) How will AFA catcher/processor sideboard limits be managed? The Regional Administrator will manage groundfish harvest limits and PSC bycatch limits for AFA catcher/processors through directed fishing closures in fisheries established under paragraph (a)(1) of this section in accordance with the procedures set out in §§ 679.20(d)(1)(iv) and 679.21(e)(3)(v).

* * * * *

§§ 679.20, 679.21, 679.31, 679.32, 679.50, and 679.64 [Amended]

8. In the table below, for each of the paragraphs shown under the "Paragraph" column, remove the phrase indicated under the "Remove" column and replace it with the phrase indicated under the "Add" column for the number of times indicated in the "Frequency" column.

Paragraph(s)	Remove	Add	Freq
§ 679.20(b)(1)(i)	except pollock and the	except pollock, Pacific cod, and the	2
Newly redesignated §679.21(e)(1)(i) introductory text	paragraphs (e)(1)(iii)(A) through	paragraphs (e)(1)(i)(A) through	1
Newly redesignated §679.21(e)(1)(ii) introductory text	paragraphs (e)(1)(iii)(A) and	paragraphs (e)(1)(ii)(A) and	1
Paragraph heading of newly redesignated §679.21(e)(1)(vi)	*Chinook salmon*	*BS Chinook salmon*	1
§679.21(e)(3)(ii)(B)(2)	paragraph (e)(1)(ii) of	paragraph (e)(1)(i) of	1
§679.21(e)(7)(viii) introductory text	paragraphs (e)(1)(vii) and (e)(1)(ix) of	paragraphs (e)(1)(vi) and (e)(1)(viii) of	1
§679.21(e)(7)(viii)(A) introductory text	paragraph (e)(1)(vii) of	paragraph (e)(1)(vi) of	1
§679.21(e)(7)(viii)(B) introductory text	paragraph (e)(1)(ix) of	paragraph (e)(1)(viii) of	1
§679.31(c)	(See §679.20(b)(1)(iii))	(See §679.20(a)(7)(i) and (b)(1)(iii).)	1
§679.31(c)	(See § 679.21(e)(1)(i) and (e)(2)(ii)).	(See § 679.21(e)(3)(i)(A) and (e)(4)(i)(A).)	1
§679.32(b)	under	under §	1

	§679.21(e)(5) in	679.21(e)(4) in	
§679.50(c)(1)(iii)	under §679.21(e)(7)(vi), or	under §679.21(e)(7)(vii), or	1
Newly redesignated §679.64(a)(1)(i)(B)	paragraph (a)(2)(i) of	paragraph (a)(1)(i)(A) of	1
Newly redesignated §679.64(a)(1)(iii)(A)	paragraphs (a)(1)(ii) through (a)(3) of	paragraphs (a)(1)(i) through (a)(1)(ii) of	1
Newly redesignated §679.64(a)(1)(iii)(B)	paragraph (a)(4)(i) of	paragraph (a)(1)(iii)(A) of	1

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Proceedings and Debates of the 105th Congress,
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Tuesday, October 20, 1998

OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 1999-CONFERENCE REPORT

THE AMERICAN FISHERIES ACT

Mrs. **MURRAY**.

Mr. President, the Omnibus Appropriations measure before us contains an important provision regarding foreign ownership and control of United States fishing vessels as well as a resolution of disputes regarding the North Pacific pollock fishery. More than one year ago, Senator STEVENS introduced S. 1221, the American Fisheries Act. A major purpose of this legislation, and a goal I strongly support, was to further increase the level of ownership of U.S. fishing vessels. The Americanization of the U.S. fishing industry began in 1976 with the passage of the Magnuson Fishery Conservation and Management Act which established a 200 mile Exclusive Economic Zone (EEZ) and prioritized access to fishery resources within the EEZ to American citizens. This legislation is an historic milestone in international marine policy and set a precedent that all coastal nations have followed. It was an important step in securing American control of the vast fishery resources off our coastlines.

Eleven years later, another step was taken to further Americanize U.S. fisheries. The 1987 Anti-Reflagging

Act required U.S. citizens to own and control at least 51% of any U.S.-flag fishing vessels. This Act also included grandfather provisions that, because of drafting errors, allowed any current U.S. flag fishing vessels that did not meet the new standard to be exempt from the new ownership standard and allowed vessels under contract to be rebuilt into fishing vessels in foreign shipyards to retain their U.S. fishing privileges. The two grandfather provisions allowed a far greater degree of foreign owned and controlled fishing vessels to remain is U.S. fisheries than had been intended. Although the United States Coast Guard correctly interpreted these grandfather provisions in a legal sense, there has been ongoing controversy regarding Congressional intent with these grandfather provisions and their application by the Coast Guard.

Eleven years later, the American Fisheries Act will finally resolve this issue. It requires a real, effective, and enforceable U.S. ownership threshold for U.S. flag fishing vessels. Under this Act, U.S. citizens must own and control 75 percent of the ownership interest in any U.S. flag fishing vessel. I strongly support these provisions as an important step in our ongoing efforts to Americanize the fisheries of the United States EEZ. It is time to more fully ensure that the vast fishery resources of the United States are harvested by Americans. These provisions will go a long way to making that the case.

In addition to the further Americanization of U.S. fisheries, the Title included in the Omnibus Appropriations measure also resolves the long-standing allocation battles surrounding the North Pacific pollock fishery. When S.1221 was introduced by Senator

STEVENS in September 1997, one of the goals in addition to Americanizing the U.S. fishing fleet was to phase out a number of Seattle-based catcher processors that had used the grandfather provisions of the 1987 Anti-Reflagging Act to enter the pollock fishery. Senator SLADE GORTON and I strongly opposed the original legislation because of the devastating impact this phase out would have had on Washington state jobs andthe Puget Sound economy. However, there were a number of Washington state constituencies who strongly supported the legislation and the phase out of these catcher processors.

In the interest of resolving this issue, Senator GORTON convened a meeting in August 1998 of all the major participants in the North Pacific pollock fishery to explore the possibility of reaching a settlement of the dispute. My good colleague from Washington state established a number of principles which all the parties agreed to and guided the discussion of potential solutions. Those discussions led to the conclusion that 4 key issues needed to be addressed: Americanization, decapitalization, rationalization, and reallocation. This meeting led to a series of intense negotiations among the major North Pacific pollock fishery participants, led by Senator STEVENS office, that provided the framework for the legislation before us.

While my colleagues from Alaska and Washington have provided a much more detailed outline of the provisions of the American Fisheries Act, I would like to summarize some of the key aspects.

This bill includes a substantial reallocation of the North Pacific fishery resource, one of the most valuable

fishery resources in the world. The 1.2 million metric ton fishery is worth approximately $250 million annually. For the last 6 years, there has been tremendous allocation disputes regarding this resource before the North Pacific Fishery Management Council. Prior to 1992, the offshore component of the fishery harvested approximately 85% of the resource. In 1992, the North Pacific Fishery Management Council reduced this harvest level by allocating 35% of the resource to the onshore component of the fishery, that is, catcher boats delivering to onshore processing plants. Recently, the Council recommended to the Secretary of Commerce increasing this percentage to 39%. This bill provides 50% of the resource to the onshore sector, 10% to the mothership sector, and 40% to the offshore sector, permanently resolving the long-standing allocation battles over this valuable resource. With each percentage point of the total allowable catch valued at approximately $5 million, this shift in harvest opportunity represents anywhere from a $55 million to $75 million reallocation.

To offset this massive move of fish, the legislation includes a substantial reduction in the excess fishing capacity in the offshore sector. Overcapitalization has been an ongoing problem in all North Pacific fisheries and is the source of the allocation battles that ensue over these fisheries. This act will permanently remove nine pollock factory trawlers from the pollock fishery, in fact, from the U.S. EEZ entirely. Eight of these vessels will be scrapped, preventing them from being used in any fishery in the world. In exchange for retiring these vessels and transferring the pollock catch history associated with them to the onshore sector, the owners of these vessels will be paid $90 million. An

additional $5 million will be paid to the remaining participants in the offshore sector of the fishery for the additional reduction in the offshore allocation. $20 million will be provided by the federal government as it bears responsibility for the failure of the 1987 Anti-Reflagging Act to effectively keep foreign fishing vessels out of the U.S. EEZ. The remaining $75 million will be paid by the onshore sector through a federally-guaranteed loan.

Replacement of the capacity represented by these removed vessels is prevented by statutorily establishing either through explicit listing of the vessels or specific criteria for participation, the factory trawlers, motherships, catcher boats, and onshore processors that can continue to participate in the North Pacific pollock fishery. This listing of the eligible fishery participants is essential to preventing recapitalization of the fishery and ensuring that steps toward rationalizing the fishery can proceed. It has not been done without controversy, however. There has been a great deal of concern among the fishing industry in Washington state and Alaska about the exclusive listing of onshore processors. Many fishery participants have made a distinction between addressing overcapitalization on the water and on the land. Many have argued that the exclusive listing of onshore processors will deny fishermen competitive markets for their fish. Others are concerned that it locks in substantial foreign investment in the processing sector of the fishery while at the same time the bill seeks to further Americanize the harvesting of fish in the U.S. EEZ. I share these concerns. However, the need to rationalize this fishery necessitates this action. In the absence of this provision, the ability to proceed with the

formation of fishery cooperatives as a means to end the race for fish could not be successful. In the end, I feel the potential benefits such rationalization could provide for both the resource and the industry dependent upon it justify this action. Nonetheless, I think it imperative that both the Council and the Congress closely monitor the impacts of this provision to ensure it achieves our goal of improving the situation for fishermen. If not, additional measures may need to be taken.

This bill relies in great measure on the ability and willingness of the North Pacific pollock fishery sectors to form fishery cooperatives. Fishery cooperatives, authorized under current law, are a privately negotiated allocation on a company-by-company or vessel-by-vessel basis of a portion of the total allowable catch. Similar to an individual fishing quota program, cooperatives provide fishery participants with the certainty they need to stop the race for fish, and harvest and process the fish on a more flexible schedule with greater attention to bycatch, efficiency, and safety. The existing fishery cooperative in the offshore sector of the Pacific Whiting fishery has shown tremendous benefits in these regards and has helped rationalize the fishery. It is hoped that cooperatives can do the same in the pollock fishery.

In the interest of ensuring that small, independent fishermen are the true beneficiaries of fishery cooperatives, the bill includes a number of requirements for fishery cooperatives in all three sectors which are designed to provide these small, independent fishermen with sufficient leverage in the negotiations to protect their interests.

In addition, the bill attempts to ensure adequate protections for other fisheries in the North Pacific and Pacific from any potential adverse impacts resulting from the formation of fishery cooperatives in the pollock fishery. The formation of fishery cooperatives will undoubtedly free up harvesting and processing capacity that can be used in new or expanded ways in other fisheries. Although many of these vessels and processors have legitimate, historic participation in these other fisheries, they should not be empowered by this legislation to gain a competitive advantage in these other fisheries to the detriment of participants who have not benefitted from the resolution of the pollock fishery problems.

While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true. Although the protections provided for the head and gut groundfish offshore sector from the pollock offshore sector are more highly developed and articulated in the bill, the protections for other fisheries are largely left for the Councils to recommend. Those of us involved intimately in the development of this legislation strongly urge the Councils to monitor the formation of fishery cooperatives closely and ensure that other fisheries are held harmless to the maximum extent possible.

In particular, the legislation directs the North Pacific Council to address the issue of latent capacity in the

Bering Sea crab fishery. I am deeply concerned by the recent failure of the North Pacific Council to address this issue in response to this legislation. The relatively minor level of protection provided in the bill for the Bering Sea crab fishery should in no way be construed by the Council as sufficient to protect the crab fishery from potential adverse impacts of pollock fishery cooperatives nor should it be deemed sufficient to address the issue of overcapitalization of the crab fishery and the need to remove latent capacity. I strongly urge the Council to take measures to further reduce latent capacity in the crab fishery beyond that which the License Limitation Program addressed and to avoid rewarding speculative participation in anticipation of the developing industry-funded capacity reduction program being developed by the crab industry. At the same time, the Council should ensure that true historic participants in the crab fishery who have made legitimate investments to harvest crab are not eliminated.

The American Fisheries Act title in this Omnibus Appropriations measure is an important next step in our efforts to Americanize U.S. fisheries and ensure their long-term sustainable use. I support this provision and will work with my colleagues to ensure that is effectively and fairly implemented. In closing, I want to thank Senator STEVENS, GORTON, and MURKOWSKI for their hard work on this legislation. I would also like to acknowledge the hard work of Trevor McCabe, Jeanne Bumpus, Bill Woolf, Martin Kodis, and my own staff, Justin LeBlanc. Without their dedication and perseverance, we would not have put this legislation together.

Congressional Record --- Senate
Proceedings and Debates of the 105th Congress,
Second Session
Wednesday, October 21, 1998

OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 1999-CONFERENCE REPORT

THE AMERICAN FISHERIES ACT

Mr. **STEVENS**.

Mr. President, we've reached agreement to include the American Fisheries Act in the legislation being passed today (as title II of division C of the bill). This Act will not only complete the process begun in 1976 to give U.S. interests a priority in the harvest of U.S. fishery resources, but will also significantly decapitalize the Bering Sea pollock fishery.

The Bering Sea pollock fishery is the nation's largest, and its present state of overcapacity is the result of mistakes in, and misinterpretations of, the 1987 Commercial Fishing Industry Vessel Anti-Reflagging Act (the "Anti-Reflagging Act"). In 1986, as the last of the foreign-flag fishing vessels in U.S. fisheries were being replaced by U.S.-flag vessels, we discovered that federal law did not prevent U.S. flag vessels from being entirely owned by foreign interests. We also discovered that federal law did not require U.S. fishing vessels to carry U.S. crew members, and that U.S. fishing vessels could essentially be built in foreign shipyards under the existing regulatory definition of "rebuild." The goals of the 1987 Anti-Reflagging Act therefore were to: (1)

require the U.S.-control of fishing vessels that fly the U.S. flag; (2) stop the foreign construction of U.S. flag vessels under the " rebuild" loophole; and (3) require U.S.-flag fishing vessels to carry U.S. crews.

Of these three goals, only the U.S. crew requirement was achieved. The Anti-Reflagging Act did not stop foreign interests from owning and controlling U.S. flag fishing vessels. In fact, about 30,000 of the 33,000 existing U.S.-flag fishing vessels are not subject to any U.S. controlling interest requirement. The Anti-Reflagging Act also failed to stop the massive foreign shipbuilding programs between 1987 and 1990 that brought almost 20 of the largest fishing vessels ever built into our fisheries as "rebuilds." Today, half of the nation's largest fishery-Bering Sea pollock-continues to be harvested by foreign interests on foreign-built vessels that are not subject to any U.S.-controlling interest standard.

On September 25, 1997, I introduced the American Fisheries Act (S. 1221) to fix these mistakes. Senators from almost every fishing region of the country joined me in support of this effort, including Senator BREAUX, Senator HOLLINGS, Senator GREGG, Senator WYDEN, and Senator MURKOWSKI. As introduced, the bill had three primary objectives: (1) require the owners of all U.S.-flag fishing vessels to comply with a 75 percent U.S.-controlling interest standard (similar to the standard for other commercial U.S.-flag vessels that operate in U.S. waters); (2) remove from U.S. fisheries at least half of the foreign-built factory trawlers that entered the fisheries through the Anti-Reflagging Act foreign rebuild grandfather loophole and that continued to be foreign-

owned on September 25, 1997; and (3) prohibit the entry of any new fishing vessels above 165 feet, 750 tons, or with engines that produce greater than 3,000 horsepower.

I am pleased to report that the package we are approving today accomplishes all three of the main objectives of S. 1221 as introduced.

I wish to thank Senator GORTON for his tremendous effort in this. For almost a decade now, he and I have had various disagreements about the Bering Sea pollock fishery and issues relating to the Anti-Reflagging Act. At the Commerce Committee hearing in March, and later, at an Appropriations Committee markup in July, Senator GORTON plainly expressed his concerns with S. 1221. In August, however, he spent considerable time with representatives from the Bering Sea pollock fishery and by sheer will managed to develop a framework upon which we could both agree. After he presented the framework to me, we convened meetings in September that went around the clock for five days. Those meetings included Bering Sea pollock fishery industry representatives, industry representatives from other North Pacific fisheries, the State of Alaska, North Pacific Council members, the National Marine Fisheries, the Coast Guard, the Maritime Administration, environmental representatives, and staff for various members of Congress and the Senate and House committees of jurisdiction.

At the end of those meetings, a consensus had been achieved among Bering Sea fishing representatives on an agreement to reduce capacity in the Bering Sea

pollock fishery. For the next three weeks, we drafted the legislation to give effect to the agreement, and spent considerable time with the fishing industry from other fisheries who were concerned about the possible impacts of the changes in the Bering Sea pollock fishery. The legislation we are passing today includes many safeguards for other fisheries and the participants in those fisheries. By delaying implementation of some measures until January 1, 2000, it also provides the North Pacific Council and Secretary with sufficient time to develop safeguards for other fisheries.

This legislation is unprecedented in the 23 years since the enactment of the Magnuson-Stevens Act. With the council system, Congressional action of this type is not needed in the federal fisheries anymore. However, the mistakes in the Anti-Reflagging Act and the way it was interpreted created unique problems in the Bering Sea pollock fishery that only Congress can fix. The North Pacific Council simply does not have the authority to turn back the clock by removing fishery endorsements, to provide the funds required under the Federal Credit Reform Act to allow for the $75 million loan to remove capacity, to strengthen the U.S.-control requirements for fishing vessels, to restrict federal loans on large fishing vessels, or to do many other things in this legislation.

While S.1221 as introduced was more modest in scope, I believe the measures in this agreement are fully justified as a one-time corrective measure for the negative effects of Anti-Reflagging Act.

I ask unanimous consent that the section-by-section

analysis I have prepared be printed in the RECORD.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

. . . .

Section 211 - Protections for Other Fisheries; Conservation Measures

Subsection (a) of section 211 directs the North Pacific Council to submit measures for the consideration and approval of the Secretary of Commerce to protect other fisheries under its authority and the participants in those fisheries from adverse impacts caused by the subtitle II of the American Fisheries Act or by fishery cooperatives in the BSAI directed pollock fishery. The Congress intends for the North Pacific Council to consider particularly any potential adverse effects on fishermen in other fisheries resulting from increased competition in those fisheries from vessels eligible to fish in the BSAI directed pollock fishery or in fisheries resulting from any decreased competition among processors.

NOAA
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE

DRAFT NOAA CATCH SHARE POLICY

EXECUTIVE SUMMARY

PURPOSE

In June 2009 President Obama stated this administration is committed to creating an integrated and comprehensive national ocean policy, incorporating ecosystem-based science and management, and emphasizing transparency and participation in our public stewardship responsibilities. Sustainable fisheries are an essential component of that commitment, and catch share programs have proven to be powerful tools to manage fisheries to sustainable levels and improve their economic performance. The draft NOAA policy encourages well-designed catch share programs to help rebuild fisheries and sustain fishermen, communities and vibrant working waterfronts, including the cultural and resource access traditions that have been part of this country since its founding.

DEFINITION

"Catch share" is a general term for several fishery management strategies that allocate a specific portion of the total allowable fishery catch to individuals, cooperatives, communities, or other entities. Each

recipient of a catch share is directly accountable to stop fishing when its specific quota is reached. The term includes specific programs defined in law such as "limited access privilege" (LAP) and "individual fishing quota" (IFQ) programs, and other exclusive allocative measures such as Territorial Use Rights Fisheries (TURFs) that grant an exclusive privilege to fish in a geographically designated fishing ground.

CONTEXT

A number of U.S. fisheries are under-performing biologically and economically and require consideration of additional tools to improve management effectiveness. For example, rebuilding U.S. stocks would increase the annual commercial dockside value by an estimated $2.2 billion (54 percent). Given the challenges facing U.S. fishery managers, the best available science and practical experience support the conclusion that it is in the public interest to encourage and support the evaluation of catch share programs authorized under the Magnuson-Stevens Fishery Conservation and Management Act (MSA)[1]. In addition, Congress, in its 2006 amendments to the MSA[2] , and national experts[3,4] have recognized catch shares are a tool that should be available for use in any fishery, subject to general guidelines for their design.

Catch share programs have been used in the U.S. since 1990 and now include 13 different fisheries from Alaska to Florida managed by six different Councils. Four additional U.S. fisheries are in the process of adopting a catch share program over the next year. Both here and in other countries catch shares have shown they can effectively achieve annual catch limits, reduce the

negative biological and economic impacts of the race for fish, and when properly designed can eliminate overfishing and result in safer and more profitable fisheries while also addressing other social objectives. This draft policy provides a foundation for facilitating the wide-spread consideration of catch share fishery management plans while empowering local fishermen to be part of the process.

GOALS

NOAA's goals are to: help reduce any administrative or organizational impediments to the consideration of catch shares; inform and educate stakeholders of the different options and capabilities of catch share programs; and help organize collaborative efforts with interested Councils, states, communities, fishermen and other stakeholders on the design and implementation of catch share programs.

Catch shares may not be the best management option for every fishery or sector. NOAA will not require the use of catch shares in any particular fishery or sector, but it will promote and encourage the careful consideration of catch shares as a means to achieve the conservation, social and economic goals of sustainable fishery management. To do so, NOAA will seek the program support outlined herein to assist in the design, transition period and operation of catch share management. Catch share programs can help transform fisheries and ensure they are a prosperous and sustainable element of a national strategy for healthy and resilient ecosystems for present and future generations.

NOAA'S CATCH SHARE POLICY

To achieve long-term ecological and economic sustainability of the Nation's fishery resources and fishing communities, NOAA encourages the consideration and adoption of catch shares wherever appropriate in fishery management and ecosystem plans and amendments and will support the design, implementation, and monitoring of catch share programs.

CATCH SHARE PROGRAM FEATURES

The MSA sets forth a number of criteria for consideration in the design of catch share programs.

NOAA recommends Councils follow this guidance and pay particular attention to the following features in designing their catch share programs:

Specific management goals: All fishery management programs, including catch shares, should identify specific goals for management.

Transferability: Councils should thoroughly assess the net benefits of catch share transferability.

Review Process: Councils should periodically review all catch share and non-catch share programs. The intent is to ensure that management goals are specified, measurable, tracked and used to gauge whether a program is meeting its goals and objectives.

Distinctions Among Sectors: No fishery or sector (e.g., commercial or recreational) is obligated to adopt catch

shares under this policy. Councils should consider the appropriateness of catch share programs and decide which, if any, sectors may benefit from their use.

Fishing Community Sustainability: NOAA encourages Councils to take advantage of the special community provisions in the MSA to help ensure the sustainability of fishing communities, including the preservation of working fishery waterfronts, fishery infrastructure, diverse fishing fleets, and resource access.

Royalties: NOAA will assist Councils if and when they determine that it is in the public interest to collect royalties in connection with the initial or subsequent allocations in a limited access privilege program.

CATCH SHARE PROGRAM SUPPORT

Because of the effectiveness, flexibility and the potential applicability of catch shares to many fisheries, NOAA will provide leadership, technical advice, and other support for the consideration and use of catch share programs. To achieve this end, NOAA will collaborate with its many federal, state and constituency partners to support catch share programs in the following four categories:

1. Reduce technical and administrative impediments to designing catch share programs. NOAA will assist Councils and stakeholders that want to move forward with catch share programs with technical and administrative support to help them design and implement a catch share program, while empowering local fishermen to be part of the process. This includes

assisting in research and evaluation of catch share applicability for their particular fishery, resolving outstanding questions on application of the MSA requirements to their proposed design, and organizing a common infrastructure and enforcement protocols to minimize program costs and promote "best practices."

2. Provide expertise and related support to assist development of new catch share. programs. NOAA will provide expertise and work with Councils and other partners to adopt and implement catch share programs that are cost effective and meet the Councils' objectives. This includes providing analytical capacity through staff details and access to external experts, providing tools for assisting fishermen to explore options and evaluate impacts of management alternatives, and facilitating access to other government and private sector programs to support the design and implementation of a catch share option.

3. Inform and educate stakeholders so that they can best participate in the design and implementation of catch share programs. NOAA will work with Councils, states and other partners to provide information and training to raise awareness and increase understanding about the advantages and disadvantages of catch share programs; to improve general catch share literacy in communities, including fishermen, regulators and the public; and to increase stakeholder engagement in the policy development and review process.

4. Coordinate data collection, research and performance monitoring of catch share programs. NOAA will partner with Councils, states, Interstate Commissions and other collaborators to ensure appropriate monitoring data are collected, relevant research is conducted, and catch share performance metrics are derived to support the consideration, adoption, operation and evaluation of catch share programs.

Footnotes

1 The MSA authorizes limited access privilege and individual fishing quota programs at 16 U.S.C. 1853(a).

2 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479.

3 U.S. Commission on Ocean Policy, 2004. An ocean blueprint for the 21st Century. Final Report Recommendation 19-15 says in part "Every federal, interstate and state fishery management entity should consider the potential benefits of adopting such [dedicated access privilege] programs."

4 National Academy of Sciences, 1999. Sharing the fish: Toward a national policy on individual fishing quotas.

NOAA
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE

DRAFT NOAA CATCH SHARE POLICY

BACKGROUND AND LEGAL AUTHORITY

In June 2009 President Obama stated this administration is committed to creating an integrated and comprehensive national ocean policy, incorporating ecosystem-based science and management, and emphasizing transparency and participation in our public stewardship responsibilities. Sustainable fisheries are an essential component of that commitment, and catch share programs have proven to be powerful tools to manage fisheries to sustainable levels and improve their economic performance. The draft NOAA policy encourages well-designed catch share programs to help rebuild fisheries and sustain fishermen, communities and vibrant working waterfronts, including the cultural and resource access traditions that have been part of this country since its founding.

Catch shares designed for federal fisheries are authorized by the Magnuson-Stevens Fishery Conservation and Management Act (MSA).[1] The original MSA was signed into law in 1976. The results of more than three decades of management under MSA represent a significant accomplishment. Yet, some U.S. fisheries are still under-performing biologically and many are under-performing economically and require

consideration of additional tools to improve management effectiveness. Rebuilding U.S. stocks would increase the annual commercial dockside value by an estimated $2.2 billion (54 percent). The policy articulated in this document provides a foundation for facilitating the wide-spread consideration of catch share fishery management plans to help accomplish this improvement while empowering local fishermen to be part of the process.

NOAA's goals are: to help reduce any administrative or organizational impediments to the consideration of catch shares; to inform and educate stakeholders of the different options and capabilities of catch share programs; and to help organize collaborative efforts with interested Councils, states, communities, fishermen and other fishery stakeholders on the design and implementation of catch share programs.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006[2] included two significant and complementary new provisions that contributed to NOAA's current focus on catch shares:

> The first provision required the establishment of a mechanism for specifying annual catch limits (ACL) in most fisheries by 2011. The ACLs place a firm cap on fisheries removals at a level such that overfishing will not occur. Accountability measures were required to accompany the ACL mechanisms.
>
> The second provision was the elaboration of criteria and guidance supporting a program of limited access privileges (LAP) to help rebuild

> overfished stocks, reduce overcapacity if it exists, and promote safety, fishery conservation and management, and social and economic benefits. A LAP is a means to distribute and enforce exclusive percentages of an ACL among participants.

Taken together, ACLs and LAPs combine the positive biological benefits of a firm cap on fishery removals with the additional benefits of achieving important economic and social objectives necessary to support sustainable fisheries.

In addition to Congress, other national experts[3,4] have recognized that catch shares are a tool that should be available for use in any fishery, subject to general guidelines for their design. Catch share programs (which include LAP and individual fishing quotas (IFQ) programs) have been used in the U.S. since 1990 by six different Councils in 13 different fisheries from Alaska to Florida. Internationally, similar programs have been used in hundreds of fisheries. Both here and in other countries catch shares have shown they can effectively achieve annual catch limits, reduce the negative biological and economic impacts of the race for fish, and when properly designed can eliminate overfishing and result in safer and more profitable fisheries while also addressing other social objectives. (For example, where preserving cultural and historic use patterns in a port is a high priority, a catch share program could be designed by a Council to maintain traditional coastal fishing communities comprised of owner-operated fishing fleets.)

Scientific analyses[5] show that fisheries managed with

catch shares have demonstrated improved biological and economic performance relative to prior management using traditional tools.

Earlier this year, the Joint Ocean Commission Initiative (i.e., the members of the former U.S. Commission on Ocean Policy and the Pew Oceans Commission) issued a statement[6] to the new administration that endorsed the use of innovative, science-based management approaches, including carefully considering, and where appropriate, employing innovative management techniques such as LAPs, catch-share programs and Community and Regional Fishery Associations.

Catch share programs can help transform fisheries and ensure they are a prosperous and sustainable element of a national strategy for healthy and resilient ecosystems for present and future generations. This draft policy provides a foundation for facilitating the wide-spread consideration of catch share fishery management policies to assist in achieving biological sustainability and economic prosperity, while empowering local fishermen to be part of the process.

POLICY

To achieve long-term ecological and economic sustainability of the Nation's fishery resources and fishing communities, NOAA encourages the consideration and adoption of catch shares wherever appropriate in fishery management and ecosystem plans and amendments and will support the design, implementation, and monitoring of catch share programs.

Definition: For purposes of this policy, a catch share program is a generic term used to describe fishery management programs that allocate a specific percentage of the total allowable fishery catch or a specific fishing area to individuals, cooperatives, communities, or other entities. It includes more specific programs defined in statute such as Limited Access Privileges (LAP) and Individual Fishing Quotas (IFQ). It also includes Territorial Use Rights Fisheries (TURFs) that grant an exclusive privilege to fish in a geographically designated fishing ground. The recipient of a catch share is directly accountable to stop fishing when its specific share allocation is reached. Definitions of related terms are included in the attached glossary.

The policy is intended to promote a future in which U.S. fisheries resources are managed for the greatest overall benefit to the Nation's current and future generations and in a manner consistent with the 10 National Standards for fisheries conservation and management. Consistent with existing law, NOAA will not require the use of catch shares in a particular fishery nor are catch shares the best management option for every fishery or sector. However, it is NOAA's intent to encourage the careful consideration of catch shares as a possible choice to best meet the conservation, social and economic goals of fishery management.

In order to "consider" a catch share program, a Council should specify sufficient catch share design characteristics during the scoping and development phase of management plan development or amendment such that stakeholders could understand potential major catch share features such as allocation and transferability, and the impacts that this option will

have on their operation. There is no requirement that every fishery management plan (FMP) or amendment must include a final catch share alternative.

CATCH SHARE PROGRAM FEATURES

The consideration of a broad range of management alternatives, including catch shares, is desirable to determine which management approach is best suited for each fishery. Each fishery is different, and catch share programs have a great deal of design flexibility to accomplish a variety of goals. The MSA sets forth a number of criteria for consideration in the design of catch share programs. NOAA recommends Councils follow this guidance and pay particular attention to the following features in designing their catch share programs: (In the following paragraphs, reference to the Councils also includes the Secretary of Commerce with respect to fishery management plans or amendments for Atlantic Highly Migratory Species).

Specific management goals: All fishery management programs, including catch shares, should identify specific measurable goals for management. Councils should develop explicit management goals (e.g., eliminate overfishing and race-to-fish or derby fishing behavior; promote more precise catch accounting to meet ACLs; identify bycatch reduction objectives and improved ecosystem functioning; improve socio-economic conditions for fishery participants and/or fishery-dependent communities, etc.) early in the management plan development process. Based on these goals, a uniquely tailored catch share program or alternative can be designed. The specific elements of the program can then be specified to achieve the

identified goals as scoping moves forward to preparation of management alternatives.

Transferability: Councils should thoroughly assess the net benefits of allowing transferability of catch shares. The choice of whether, when and to whom to allow transfers (by sale or lease) of catch shares by initial recipients is one of the many design options to be evaluated and decided by Councils. After the initial allocation decision, it is one of their most significant choices. The majority of catch share programs in place allow at least some degree of transferability. Transferability of shares can: directly affect the ability of the resulting program to respond to any initial allocation anomalies; control future entry and exit to the fishery; help achieve goals for reducing overcapacity and improving economic efficiency; and control the achievement of many other biological, economic and social objectives the Councils may have established. NOAA is committed to providing technical advice and support to the Councils and affected stakeholders in evaluating the transferability option.

Review Process: Councils should periodically review all catch share and non-catch share programs. The intent is to ensure that management goals are specified, measurable, tracked and used to gauge whether a program is meeting its goals and objectives. The review process is the final stage of the management cycle after setting specific objectives and implementing and monitoring a management plan. The MSA requires Councils to regularly monitor and review the operations of its LAP programs. Once management goals and FMPs are in place, section 303A(c)(1)(G) requires the conduct of a formal and detailed review

after 5 years for each LAP program. In addition, the Secretary is required to review on a continuing basis and revise as appropriate the conservation and management measures included in Atlantic Highly Migratory Species plans. However, Councils are not currently required to conduct similar periodic reviews of their non-LAP fisheries. Performance metrics for some of the typical fishery goals may include how fishery stocks responded, what were the impacts on fishing communities, participation and entry into the fishery, what happened to prices, revenues and profits, and how fishery access and participation rates changed after program initiation.

Distinctions Among Sectors: No fishery or sector (e.g., commercial or recreational) is obligated to adopt catch shares under the policy. Councils should consider the appropriateness of catch share programs and decide which, if any, sectors may benefit from their use. Under the MSA, Councils have the opportunity to consider the possible adoption of catch shares for all fishery sectors; for some sectors; to phase-in their adoption over time; or to not adopt catch shares. Historically, the application of catch shares has focused on the commercial sector of a fishery. If a Council adopts a catch share program for the commercial sector, the MSA does not require catch shares to be adopted in the recreational or any other particular sector of a fishery.

There may be circumstances where catch shares cannot provide positive net biological, social or economic benefits to all sectors of the fishery, and Councils are free to decide where to adopt catch shares.

It is conceivable that the initial plan for catch shares for

one segment of a fishery (e.g., for one species in a multispecies fisheries, or catch shares in the commercial sector but not the recreational sector) could have effects on other segments of the fishery. In instances where such impacts are reasonably foreseeable, Councils and NOAA should evaluate the effects of catch shares on all sectors associated with a fishery, regardless of whether they are in the catch share program. This should be done at the early stage of consideration of catch shares as a management option to allow adaptation in both the catch share and non-catch share program elements to ensure conformance with the MSA.

The allocation of quota among competing segments in a fishery has been one of the most difficult policy decisions for the Councils in the past. National Standard 4 of the MSA requires that any allocation of fishing privileges be fair and equitable. Allocations of quota to recreational, commercial, tribal, aboriginal and subsistence sectors; among gear types within a sector; and reserving quota for reasons of research, conservation, forage and/or scientific and management uncertainty are all decisions currently made by Councils.

Catch shares distribute quota within a sector (e.g., recreational or commercial), as a percentage of the sector allocation. The allocation to a sector can increase or decrease over time, while leaving the percentage quota within that sector stable. Councils should periodically revisit sector allocations based on consideration of conservation issues, economic and social values.

Councils can opt to manage the commercial sector with catch shares and manage the recreational sector by other means; catch share programs can implement whatever distribution of the allowable catch the Councils decide upon subject to MSA requirements. Criteria and schedules to reallocate quota can be directly included in the fishery management plan design, and an unscheduled reallocation can be considered at any time by plan amendment if circumstances warrant.

The granting of catch share privileges to an entity is not made in perpetuity. The MSA defines a LAP as a permit, issued for a period of not more than 10 years, which will be renewed if not revoked, limited or modified. The program can be amended at any time specified by the Council. Regular monitoring and review of catch shares by the Council is expected and a formal and detailed review 5 years after implementation of the program (and at least every 7 years thereafter) is required by statute. The design flexibility, including transferability provisions, associated with catch shares helps ensure that all allocations of allowable catch are fair and equitable, regardless of whether every sector chooses to adopt a catch share for their sector.

The key to success is a thoughtful program design process. A comparative framework is an efficient means to assess different design and implementation choices for management of a particular fishery or sector. A useful starting point for evaluating the pros and cons of different catch share design options can be found in NOAA's technical memorandum on LAPs 7 where it identifies seven criteria for the evaluation of LAP

programs relative to other types of management strategies for a particular fishery. NOAA is committed to working with recreational, commercial and other stakeholder groups to help them assess their options and the advantages and disadvantages of adopting a catch share program for their sector.

Fishing Community Sustainability: NOAA encourages Councils to take advantage of the special community provisions in the MSA to help assure sustainable fishing communities, including the continuation of working fishery waterfronts, fishery infrastructure, diverse fishing fleets, and resource access. Fisheries have provided the underlying economic, social and cultural fabric of many coastal communities for centuries. However, changing circumstances in fisheries as well as many outside influences are resulting in risks to the sustainability of the fishing community way of life. National Standard Eight of the MSA and section 303A require management authorities to take into account the importance of fishery resources to fishing communities. Section 303A provides unique design options for LAPs that can promote the sustained participation of communities and minimize adverse economic and social impacts of fishery management. NOAA will work in partnership with other federal agencies and coastal states, consistent with the goals of the MSA and each Council's fishery management plan's objectives, to use catch shares to promote sustainable fishing communities, resource access and co-management principles.

To this end, NOAA will help support community-based design and investment in innovative fishery management options. This partnership would include

providing technical assistance in the development and submission of community sustainability plans under MSA Section 303A, and providing technical assistance in the creation of fishing community trusts or permit banks to help retain access to fisheries resources by fishermen in local communities.

NOAA will assist communities in planning and adapting to changing economic, environmental and management conditions. Additional capacity and statutory authority may be available from other NOAA line offices, other Commerce bureaus (e.g., Economic Development Administration assistance to communities to develop and implement economic development and revitalization strategies) or other agencies (such as the Small Business Administration to deal with access to capital and business planning expertise). NOAA will also encourage public-private partnerships, and facilitate collaboration with state and local governments, regional economic development districts, public and private nonprofit organizations, and tribal entities to help communities address problems associated with long-term fishery and community sustainability.

Royalties: NOAA will assist Councils if and when they determine that it is in the public interest to collect royalties in connection with the initial or subsequent allocations in a limited access privilege program. The Nation's fisheries resources are managed in the public trust by NOAA. Many of the Nation's other public resources consumed or used by private individuals are subject to a payment (i.e., resource rental) for their usage (e.g., oil and gas leases, grazing or silviculture on federal lands, usage of federal radio frequency

spectrum). To date, the recipients of initial allocations of catch shares have received their allocations based on their historical fishing records; no Council has employed a program to collect resource rent.

Section 303A(d) of the MSA requires the Councils to consider the collection of royalty payments for the initial or any subsequent distribution of LAPs. Any fishery management plan or amendment containing a LAP program should include a description of how this MSA provision was addressed. It is important to note that if a Council decides to include a royalty program, the revenues would be deposited in a special fund and can only be expended in the fisheries from which they came. Currently no LAP program collects royalty payments. Many important social, economic and community objectives of a fishery management plan could be funded by royalty payments such as supporting specific goals for research, monitoring, new entrants/small entities, or sustainable fishing communities. Collection and use of royalty payments is one of several options. Initial share allocations/set-asides, adaptive management programs, and loans/subsidies for share purchases are alternatives that can support similar outcomes.

The MSA provides the Councils with a great deal of flexibility to determine the timing, amount and means to collect royalty payments. For example, royalties could be deferred in the initial years of implementation to account for weak economic conditions at a program's outset. Any royalty program must be carefully designed and sized so it does not undermine or offset the biological conservation and economic incentives associated with catch shares. NOAA will assist Councils

and stakeholders to provide more specific guidance on royalty program design options where desired, and consult with Councils, states and affected stakeholders on use of any subsequent royalty funds collected.

CATCH SHARE PROGRAM SUPPORT

Because of the effectiveness, flexibility and the potential applicability of catch shares to many fisheries, NOAA will provide leadership, technical advice, and other support for the consideration and use of catch share programs. To achieve this end, NOAA will collaborate with its many federal, state and constituency partners to support catch share programs in the following four categories:

1. Reduce technical and administrative impediments to designing catch share programs. NOAA will assist Councils and stakeholders that want to move forward with catch share programs with technical and administrative support to help them design and implement a catch share program, while empowering local fishermen to be part of the process. This includes assisting in research and evaluation of catch share applicability for their particular fishery, resolving outstanding questions on application of the MSA requirements to their proposed design, and organizing a common infrastructure and enforcement protocols to minimize program costs and promote "best practices."

2. Provide expertise and related support to assist development of new catch share programs. NOAA will provide expertise and work with

Councils and other partners to adopt and implement catch share programs that are cost effective and meet the Councils' objectives. This includes providing analytical capacity through staff details and access to external experts, providing tools for assisting fishermen to explore options and evaluate impacts of management alternatives, and facilitating access to other government and private sector programs to support the design and implementation of a catch share option.

3. Inform and educate stakeholders so that they can best participate in the design and implementation of catch share programs. NOAA will work with Councils, states, Sea Grant and its Marine Advisory Service, and other partners to provide information and training to raise awareness and increase understanding about the advantages and disadvantages of catch share programs; to improve general catch share literacy in communities, including fishermen, regulators and the public; and to increase stakeholder engagement in the policy development and review process.

4. Coordinate data collection, research and performance monitoring of catch share programs. NOAA will partner with Councils, states, Interstate Commissions and other collaborators to ensure appropriate data are collected, relevant research is conducted, and catch share performance metrics are derived to support the Councils in their consideration, adoption, operation and evaluation of catch share

programs

The following sections outline the specific actions that NOAA believes will ensure catch share programs have the highest likelihood of success. NOAA will work diligently with its partners to identify and secure the necessary support to most effectively carry out as many of these activities as possible.

1. Reduce technical and administrative impediments

1.1 – Evaluate Catch Share Applicability. Studies of U.S. and foreign fisheries suggest that catch share policies have significant potential for increasing economic returns from fishing and the sustainability of fisheries. The fisheries that have seen the biggest economic gain from catch shares are those where there is the potential for high-end markets (investing in quality) and/or where there are advances in product recovery from eliminating the race-for-fish (e.g., whiting on the west coast). At the same time, not every fishery will ultimately be a suitable candidate for catch shares.[8] The following is a brief list of fishery characteristics indicating where catch shares could be particularly beneficial. The list is not exhaustive, nor does it suggest that if a fishery doesn't have one or more of these indicators that it is not a good candidate for catch shares.

a. Fishery is overcapitalized – Overcapitalized fisheries are more likely to have lower economic returns to fishermen than could be achieved through catch shares. A fishery demonstrates excess capacity in the form of larger than necessary fishing fleet size, type or amount of

fishing equipment, etc., to harvest the total allowable catch. Generally, historical open access policies lead to race-for-fish or derby conditions, and result in overfishing, overfished stocks and overcapitalized fisheries. If a fishery is overcapitalized, transferable catch shares can result in a more economically efficient fleet size.

b. Stakeholders are receptive – Well-informed fishermen who want to pursue consideration of catch shares will improve the likelihood of success of this fishery management option. Enabling stakeholders to evaluate their options by providing complete and unbiased information requires extensive education and outreach. Fisheries where this has taken place are good candidates for consideration. Single species or few sectors in a fishery make management less complex for any choice of strategy/approach. In the near term, catch share application in a phased approach (i.e., species or sector) may be more amenable to
stakeholders.

c. Stocks are overfished – Stocks that have a status of "overfished" or that are experiencing overfishing require a multitude of controls to regulate fishermen behavior. Such fisheries are among those now required to have annual catch limits (ACLs) and rebuilding plans under the MSA. While well–enforced ACLs will limit catches they do not address the destructive impacts of the race for fish. Combining ACLs with the allocation of exclusive privileges to stakeholders can help meet total allowable catch

targets, reduce the negative impacts of the race for fish, and promote greater freedom and flexibility in fisherman business decision making than when ACLs are used alone.

d. Regional/Institutional infrastructure exists – NOAA Fisheries Service regions with existing catch share management can take advantage of economies of scale in management operations for multiple catch shares in a region, thereby reducing costs to fishermen and taxpayers. The marginal costs for data collection, administration and enforcement can be spread over multiple species or fisheries. Each circumstance must be evaluated on its own merits since the flexibility inherent in catch share program design allows them to be customized to succeed under varying conditions.

e. Bycatch is significant – Excessive bycatch is an indicator that catch shares may contribute to a solution. In its 2007 meta-analysis, the Redstone Group[9] analyzed 10 U.S. and British Columbia fisheries managed by LAPs and found seven instances where LAPs contributed to a positive environmental recovery by promoting more selective and efficient fishing practices. There is evidence that IFQs slow the pace of fishing and encourages cooperation and fishermen stewardship that results in positive ecological implications relative to overfishing, bycatch mortality and habitat disturbance.[10] Cooperatives formed under catch share programs (e.g., Gulf of Alaska rockfish pilot program and Bering Sea pollock and non-pollock

cooperatives) have also experienced decreased discards as fishermen are able to become more selective and redirect their effort away from areas of undesirable bycatch to avoid prohibited and non-target species. Notwithstanding these benefits, care must be exercised in the design and monitoring phases to prevent or control for any highgrading of fish harvested that may occur under certain conditions.

1.2 – Issue specific policy guidance. The draft NOAA policy lays out high level principles regarding catch shares but does not address specific questions of technical interpretation and applicability raised by implementation of the 2006 MSA amendments. Such questions have been raised by NMFS, Councils, industry and environmental groups on the new LAP provisions of Section 303A. The NMFS Office of Sustainable Fisheries identified a number of these issues during an October 2007 public scoping process and through various Council venues.

There is a need to promote consistent and correct application of the Act. Many issues will be addressed by issuance of informal guidance and the conduct of regional or national workshops.

However, there may remain other issues requiring formal notice, public comment and rulemaking, and NOAA will seek input from stakeholders, Councils and NMFS staff to complete this task using a public participatory process.

1.3 – Create a common catch share infrastructure. Catch share program designs can be very simple or

complex, with costs changing accordingly. Costs for redundant infrastructure may become an impediment to new programs. Given the projected use of catch shares, NOAA and its partners will evaluate a common catch share infrastructure in areas such as issuing allocations and monitoring transfers, information systems to track landings, and enforcement and observer capabilities for monitoring, control and surveillance. NOAA and the Councils will look for economies of scale, efficiencies, and consistency to minimize costs of catch share programs to taxpayers and the industry. This includes looking for ways to exploit technology, policy solutions that include mechanisms to reduce the costs for implementation and operation, and the possible adoption of standards and/or a multi-region infrastructure to support multiple programs.

A means to accomplish this is to organize a temporary infrastructure working group of relevant NOAA, Council, state and industry experts to advise practitioners on the establishment of processes to implement and operate catch share programs. The team would be comprised of experts in information technology, administration and finance, monitoring and enforcement, statistics and survey/data collection design, and observer programs. Its purpose would be to derive infrastructure "best practices" for catch share operations, and then disband upon delivering their report.

One of the challenges facing NOAA is the integration of new catch share programs with multiple FMP requirements across fisheries, some of which will not be managed using catch shares. In some cases, Council,

state and international boundaries will be crossed. Integration of plans across several jurisdictions will require special planning and communications efforts between NOAA, Councils, states, Commissions and other management bodies especially during the transition period to a new program.

While each catch share program design will be unique, similar functions such as annual specification of shares, data collection and monitoring, and enforcement need to be performed for any catch share program. A standardized methodology, regionally customizable, should be evaluated and made available where feasible with reusable information technology components and modular designs. Three possible areas to investigate are:

a. Allocations – The derivation of initial allocations of privileges and annual computation of an individual's catch limit each require a quality-controlled record of the process. Each NMFS Region has a different structure and record process for handling allocations. Issuance of standards and best practices would ensure compliance with the many federal record requirements, including procedures governing confidentiality and personally identifiable information, Treasury debt check requirements, and Administrative Record Act archiving standards.

b. Appeals – The MSA requires inclusion of an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges [Section

303A(c)(1)(I)]. Fairness in administrative appeals suggests that applicants in LAP programs anywhere in the country should be provided with a consistent set of procedures for the filing and consideration of appeals. Each NMFS Region has had a different structure and process for handling appeals. NOAA plans to evaluate whether a more harmonized approach to handling administrative law appeals in LAP programs is warranted, or whether the current, more diversified structure should be retained.

c. Share registration/transfers/liens – NMFS was required in Sec 305(h) of the 1996 MSA amendments to create a central registry system for limited access system permits. The purpose was to provide for registration of title to, and interests in, such permits as well as procedures for changes in the registration of title due to involuntary transfers, judicial or non-judicial foreclosures, enforcement of judgments, etc. A number of serious problems blocked completion of this task. While a central registry does not currently exist, transfer and ownership information is still tracked by individual IFQ programs. However, the amount of data collected varies, there is no integration of information across programs, and the mandatory registration or transfer fees are not collected.

Establishing a central registry is still an extremely useful service to provide to fishermen interested in buying, selling, leasing or collateralizing catch shares. However, the authority to require registration and collect

registration fees for non-LAP catch shares may need to be examined. NOAA will lead a work group of relevant experts to identify and recommend options for the resolution of the technical, legal, budgetary and potential legislative impediments to establish and operate a central registry for all U.S. catch share programs.

1.4 – Enforcement protocols. The roles and responsibilities for enforcement of fishery management regulations under catch shares requires guidance as more fisheries devolve many aspects of compliance to the recipients of catch shares. Record keeping and reporting requirement choices must be made and appropriate coverage levels determined, including dockside monitors; double entry accounting systems; vessel clearance and prior notice of landings provisions; and usage of vessel monitoring systems and related technologies. Council, NOAA and state policy and enforcement experts will collaborate on a "best practices" guidance effort to advise on the degree to which industry pays for these services and the extent to which an association, community or sector is responsible for the reporting of its membership.

1.5 – Create a model catch share program design process. A model design process would incorporate collaborative sessions in which a group of stakeholders and managers work together to draft a solution to a design problem. Used in combination with public hearings and workshops, a catch share design handbook, and related reference materials and expertise, a formalized design process would outline in checklist-like form a means to explore the necessary

steps in creating a catch share design. NOAA will work with Councils, states and stakeholders to create a model catch share program design process. This includes all stages from the setting of objectives to an assessment of the pros and cons and benefits and costs of different operational designs. While such a complex task cannot be reduced to a "cookbook," history with the MSA operational guidelines and regulatory streamlining processes has shown such guidance improves the completeness and efficiency of the management process.

2. Providing expertise and related support

NOAA wants to encourage Councils to fully consider catch shares when Councils take up fishery management plan amendments. To accomplish this, NOAA will help support the NOAA Fisheries Service regions, Councils, states and stakeholder groups interested in designing and implementing a catch share program consistent with the MSA. This includes providing support and expertise to help those fisheries that wish to consider and adopt them.

2.1 –Support for Catch Share Programs. To support NOAA Fisheries Service regions, Councils, states and stakeholders in considering and developing efficient catch share programs under the MSA, NOAA will work to assist in the design, transition period and operation of catch share management. Costs for catch share programs include the same operational categories associated with other management strategies, plus some additional design, operational and monitoring costs due to changes in scale. These additional costs arise because all the operational and monitoring

activities formerly done only at the fleet-wide level are now conducted for each individual receiving a catch share. While cost recovery will reimburse the public for some of the costs of management, data collection and enforcement, actual costs can exceed the 3 percent cap particularly in the early years of a catch share program and in cases of currently overfished stocks. Design costs (i.e., prior to implementation of a LAP) are also not subject to cost recovery.

Cost recovery can be especially problematic in economically depressed fisheries or for low-valued species. The subject of who pays for these costs may become an impediment to catch share support in the short term. Therefore, government support may be needed for some fisheries to address start-up costs, but the benefits of rebuilt fisheries can outweigh these costs in a relatively short period of time for most fisheries.

Under any structure, NOAA Fisheries Service and Councils will need to design the most efficient programs possible to minimize costs to the participants and the public. This includes promoting common infrastructure capabilities that support multiple catch share programs and spread the costs across multiple fisheries.

2.2 - Incremental costs. It is NOAA policy to compute and recover only the incremental operating costs associated with LAPs from participants. Section 303A(e) of the MSA requires cost recovery of the management, data collection and enforcement costs of a LAP. The relevant costs to recover are the incremental costs, i.e., those costs that would not have been

incurred but for the LAP program. Conceptually, measuring these costs involves a "with and without" comparison of the cost of running the management program for the specified fishery under the status quo regime, relative to the cost of running the management program under the LAP program. The difference is the incremental costs attributable to implementing the LAP program.

This approach limits the participant's costs of adding LAP programs, and minimizes any disincentive to consider catch shares for Councils and their constituents as they evaluate replacing non-LAP programs with LAPs.

2.3 – Identify experts to help Councils and regions. NOAA will establish a pool of NOAA employees and staff from universities, other state, federal and foreign fisheries agencies familiar with catch shares for assignment among Councils and NOAA regional offices engaged in active consideration and design of a catch share program. Using the authorities of the Intergovernmental Personnel Act, National Science Foundation post–doctoral fellows programs and other federal human resource programs, NOAA will actively search and recruit capacity to meet short term needs for catch share expertise in the field.

2.4 – Complete a NOAA nationwide blanket task-order contract. Easy access to outside consultants would be very helpful to help design and implement catch share programs, and should be made available to/used by any Council/region. Each Council and NMFS region is separately making use of outside expertise to assist in designing and executing catch share programs. NOAA

will negotiate a task-order contract with a variety of vendors and consultants to provide easy access to additional short-term or long-term capacity, potentially at lower costs, without the delays and cost inefficiencies of separate procurement actions.

2.5 – Develop business analysis and decision tools for use by industry. To help evaluate the relative merits of different catch share designs, NOAA will develop easy to use bioeconomic models for fishermen that compute profit/loss or breakeven analyses of different management options. These tools would help answer the question of "What-if" scenarios. This will enable more direct comparison of an individual's position under different design options as catch share alternatives are discussed. These models could be simple spreadsheet analyses posted on the internet that allow input of different cost and revenue structures and that compare changes in economic performance under various catch share allocations.

2.6 – Support fishermen's/community groups to help explore and organize fishery management innovations and their accompanying infrastructure to improve the health of marine fisheries, fishing communities and local economies. To this end, NOAA will work with fishing communities on community-based and innovative fishery management options. This partnership could include providing technical assistance in the development and submission of community sustainability plans under MSA Section 303A, and providing assistance to help to develop fishing community trusts or permit banks that retain access to fisheries resources by fishermen in local communities.

2.7 – Promote the wider use of the NMFS Fisheries Finance Program for purchase of quota shares. NOAA will work with Councils and stakeholders during the design and implementation phase of their catch share programs to promote the use of the NMFS Fisheries Finance Program to support the purchase of quota shares. Currently, under MSA Section 303A(g), only two of the 12 catch share programs utilize this capability that was designed to help small vessel owners and first time limited access privilege purchasers.

3. Informing and educating stakeholders

3.1 – Implement a long-term education and outreach strategy. NOAA will coordinate the design and implementation of a communications plan to help ensure the public is aware of NOAA's draft and final Catch Share Policy, informed of its progress, and engaged in its implementation. Some constituents are unfamiliar with the term "catch shares" others have limited knowledge of the concept and worry about being excluded from their fisheries. There is a great deal of concern about impacts to fishing communities. The objective is to partner with the states, Councils, universities and other constituent service providers, such as the Sea Grant Marine Advisory Service, to provide consistent and regular interaction with stakeholders to communicate authoritative science-based catch share information, fill knowledge gaps, allay fears and misconceptions, and prevent misinformation from spreading.

3.2 – Creation of a virtual information center/information web portal. The objective of

creating an authoritative and proactive NOAA source of catch share information is to provide access to best available scientific information. NOAA will create a web-based tool to centralize catch share bibliographies, references, FAQs, referrals to regional expertise, case studies, news and information. This information resource will archive theoretical and applied research papers and data, along with real world case study materials in a data warehouse form. Councils, industry members, academia and Congressional staff are some of the projected clients who would contribute to and be served by the site. Videos and related curriculum materials will be produced to assist teachers in schools and universities as well as for statutorily–required new Council member orientations. The virtual information center will host an interactive Q&A function to receive questions and post replies from stakeholders and interested parties on catch shares.

At the NOAA level, several initiatives are necessary to reinforce this effort. There will be an ongoing catch share web presence on the NOAA home page. Materials will be prepared on catch share progress for NOAA World and other NOAA publications, and for possible inclusion on the Smithsonian's Natural History Museum Sant Ocean Hall and regional science museum news tickers and kiosks. NOAA will evaluate production of a "Science on a Sphere" application focusing on global application of catch shares and sustainable fisheries. These efforts will contribute to greater public literacy regarding catch shares and fishery sustainability.

Collaboration or partnerships with Councils, states and other entities to prepare and deliver content will pool

common resources and avoid duplication of effort.

3.3 – Plan and execute an 18-month schedule of regional workshops and webinars. NOAA will establish a series of programs whereby information about current and pending catch share programs here and abroad is presented and discussed with stakeholders. While a catch share web-portal is important, it is a passive communication approach. NOAA will also actively engage stakeholders and the public directly and at the regional level, working with them in person or electronically on an individual basis on how to consider and develop a catch share program that works for them. These presentations will be prepared and presented in collaboration with Councils, states, academic partners, and industry and sector organizations. NOAA will make efforts in conjunction with these stakeholders to identify and attend appropriate events and venues to ensure broad dissemination of information about catch share programs. The purpose would be tailored to individual audience needs but would utilize case study examples of the pros and cons of various experiences with catch share programs to share with interested parties.

Initial topics being considered for serial workshops around the country include: 1) means to ensure sustainable communities and employment; 2) how to evaluate options for transferability and regulate excessive share formation; and 3) design options for initial allocation of privileges. This last workshop issue would include elements to consider in the decision whether to capture royalties and the means and techniques to accomplish this option.

One of the most important workshop issues under consideration for fishing communities would feature instructions on how to create regional fishing associations and fishing community sustainability plans that satisfy the requirements of the MSA. Related community organizing topics include how to establish fishing community associations that create permit and harvest privilege banks for the benefit of local citizens.

3.4 – Implementation of a NOAA Catch Shares Center of Expertise. To provide the capacity to accomplish the previous tasks, NOAA is exploring the creation of an internal NOAA Center of Expertise (COE) to function as an agency-wide coordination and consulting group. Consisting of a 4-5 person core staff, capacity would be supplemented by staff rotating in and the contracting of external expertise on a demand basis. NOAA would seek support for temporary assignments from the various Commerce Department and NOAA leadership development programs and the NOAA Sea Grant Marine Policy Fellow program. With expertise in economics, law and fishery management, the core staff would be recruited anew and/or be filled by existing staff on long term details. In addition, external experts in the university community would be retained on an as-needed contract basis to help as advisors for the development of enabling solutions and to help troubleshoot issues in existing catch share programs.

NOAA's goal is to capitalize on both longstanding and newly-formed expertise in NMFS regions on catch share programs and to avoid "reinventing the wheel" every time a new region or Council considers a new catch share program. The COE would also respond to specific design and/or policy problems from Councils.

While COE staff could occasionally be deployed in temporary duty status to assist regions in critical phases of catch share design and implementation, separate temporary or permanent staff resources to the NMFS regional offices and Councils will be necessary to carry out the longer term day-to-day implementation and operational issues. This small staff approach is designed to help keep costs low and levels of expertise high by utilizing a combination of in-house consultation and access on-demand to a newly-formed network of national and global experts on catch share programs.

3.5 – Create a speakers bureau. NOAA will work with Councils and states to identify fishermen who are willing to share their catch share experience with other fishermen and Councils. The volunteers would speak with Councils and fishing communities who wish to hear first hand of experiences with catch shares elsewhere in U.S. fisheries.

To archive this information and make it more widely available, this effort will be linked with the NOAA website "Voices from the Fisheries." The Voices from the Fisheries Database is a central repository for consolidating, archiving, and disseminating oral history interviews related to commercial, recreational, and subsistence fishing in the Unites States and its territories. Oral history interviews are a powerful way to document the human experience with our marine, coastal, and Great Lakes environments and our living marine resources. Catch share oral history experiences, both positive and negative, can be an important tool for Councils and communities considering their own catch share designs.

4. Data, research and performance monitoring The data collection, science and research support for MSA fishery management has been a successful highly collaborative partnership of NOAA, Councils, states, Commissions, universities and the fishing industry. Activities to support the consideration and adoption of catch shares will continue to rely heavily on these collaborations. The activities outlined below are based on advancing existing partnerships with Councils, states and the Interstate Commission data programs to establish standards for monitoring and data collection that universally apply regardless of whether a catch share program is the preferred management alternative.

All fisheries require accurate and timely catch accounting regardless of management approach.

While the scale and scope of monitoring and compliance needs will vary with fishery conditions, catch shares don't have inherent monitoring needs that are unique. In some cases the transition to catch shares has coincided with improvements that have been lacking for years in monitoring and observer programs to support science and management.

4.1 – Establish a nationwide electronic reporting goal for all fisheries. It is NOAA's goal that all U.S. fisheries managed under the MSA adopt electronic reporting to improve accuracy, timeliness and completeness of reporting. NOAA is mindful that some communities and geographic areas may lack sufficient technology access, have language barriers, or face other challenges to electronic reporting that require special consideration. However, as early as 1998, NOAA

identified the elements of a fisheries information system made up of regional electronic reporting programs meeting a commonly agreed upon set of standards. This report to Congress was in response to the 1996 MSA requirements of Section 401(a)-(f). Such a system is not yet implemented. Available funds have supported the research and development phase of a national permit system. The conversion of fisheries statistics programs from paper-based or non-standard regional systems to satisfy an electronic reporting standard will face technical and organizational challenges for NOAA and its many state data collection partners, and will require close collaboration with Councils and respondents.

4.2 – Observer program design. Observers record data at-sea that are not available for recording at dockside, including those events that require independent validation of self-reported data by fishermen. Many of the current observer programs were initiated to monitor compliance with policies and requirements governing interactions and bycatch of marine mammals and protected species. Today, observers support multiple missions of science and research in addition to fisheries and protected resources compliance monitoring. The most challenging elements involve the inter-related issues of coverage/sample size, costs, and who pays those costs (industry versus government), regardless of whether the fishery uses catch shares.

Existing funding models for monitoring vary, but catch share programs are more likely to recover costs associated with monitoring than non-catch share programs. In some of the fisheries currently developing a catch share program, including for Pacific groundfish,

fishing participants are expected to take over the costs of monitoring (including on-board observers) after a transition period lasting a few years, as fishery economics improve.

To date, there is little guidance on what level of coverage is "sufficient" for management, catch shares or otherwise. But this question is often raised during a transition to catch shares. NOAA will empanel a temporary work group of NOAA, Council, state and other experts to provide scientifically-based advice and guidance to Councils facing this decision. This advice will include a means to analyze the objectives of the fishery management plan and evaluate the applicability of observers and/or video or other technology solutions, and the ability to recover costs in lower valued fisheries. Moreover, NOAA will lead a collaborative Council, state, industry and stakeholder effort to consider the question of when the industry and when the government should pay for the cost of observers. Such an effort would provide clarity to the fisheries considering catch shares and promote fairness and equity between different fisheries and regions of the country.

4.3 Catch Shares Market News. In catch share programs where transferability is allowed, the buying, selling and leasing of shares is a common occurrence. In combination with the services provided by a lien registry, access to non-confidential summaries of market prices of share transfers and leases can result in more stable and orderly market functions. Access to authoritative government sources of unbiased market information is commonplace in agriculture and fisheries and has a history going back to the 1937 Agricultural

Marketing Act. In addition, internal NOAA use of the confidential price data on share transactions is essential to track and monitor the economic performance of the fishery, and evaluate the ongoing performance of the catch share program implementation. While non-governmental third parties may establish private trading platforms for limited access privileges, NOAA will work with Councils and the industry to establish data collection programs to collect data on the terms and prices of sales and leases consistent with the confidentiality provisions of the MSA, and provide non-confidential market news data to stakeholders.

4.4 – Conduct catch shares research program. NOAA is committed to carrying out a comprehensive research program on the design, operations and outcomes of catch share programs. The nearly 20 years of NOAA experience with catch share-type management has shown the great diversity of goals, designs and operations such programs can include. For the 13 federal programs currently in place in the U.S., NOAA will widely distribute summaries of their key features and outcomes. There is also a wealth of underutilized scientific literature on catch shares, including the previously referenced National Academy of Sciences IFQ and Community Development Quota studies and the NOAA Technical Memorandum on the design and use of LAP programs. NOAA will use its scientific capacity along with its extensive list of partnerships, cooperative institutes and other researchers to apply biological, economic and socio-cultural research results to the management issues of sustaining U.S. fisheries.

4.5 – Establish relevant performance measures. Determining relevant performance measures for

monitoring the outcomes of catch share programs is essential. NOAA is committed to working with Councils, stakeholders, the Department of Commerce, the Office of Management and Budget, and Congress in improving and monitoring useful and relevant performance metrics for all U.S. fishery management policies, not just catch share programs. The derivation of such performance measures will contribute to the Council FMP Review Process described earlier on page three.

Performance measures need to be linked back to the initial objectives in a FMP. Many current FMPs have general and sometimes vague objectives. Objectives for biological, economic and social outcomes should be readily measurable, such as eliminating overfishing and the race-to-fish or derby fishing behavior; promoting more precise catch accounting and reducing scientific uncertainty to meet ACLs; reducing bycatch and improving ecosystem function; improving socio-economic conditions for fishery participants and/or fishery-dependent communities.

Catch shares can result in fishery improvements in many areas but the metrics chosen to monitor performance should not be limited by the availability of data. It is important to ensure in the catch share design stage that share holders will supply relevant data to monitor program performance in return for their allocation. This includes obtaining more specific biological and economic performance data from the participants, in accordance with applicable law governing maintenance of business trade secrets and confidentiality of data. In addition, the social recovery metrics should encompass the broad range of possible

social and community impacts. Relevant measures to be considered may include impacts on quality of life, degree of community stability and preservation of cultural values and traditions.

Table 1. Summary of specific activities proposed to support the consideration of catch share programs under the draft NOAA policy, subject to availability of funds.
1. Reduce technical and administrative impediments
1.1 Provide Councils a list of possible characteristics to evaluate catch share applicability 1.2 Issue policy guidance on the interpretation and consistent applicability of the new limited access privilege section of the Magnuson–Stevens Act. 1.3 Create a common catch share infrastructure to minimize costs of catch share programs to taxpayers and the industry in areas such as issuing allocations and monitoring transfers, information systems to track landings, and enforcement and observer capabilities for monitoring, control and surveillance. 1.4 Develop best practices for enforcement protocols associated with catch share programs. 1.5 Create a model catch share program design process including design of public listening sessions and workshops, a catch share design handbook, and identification of reference materials and expertise.
2. Providing expertise and related support
2.1 Assist in the design, transition and operation of catch share management. 2.2 It is NOAA policy to compute and recover only the incremental operating costs associated with LAPs (not the full costs of management) to minimize any disincentive to consider catch shares.

2.3 Identify experts and assign them among Councils and NOAA regional offices in active consideration and design of a catch share program. 2.4 Complete a NOAA nationwide task-order contract for use by any Council and NMFS region to easily access outside expertise to assist in designing and executing catch share programs. 2.5 Develop business analysis and decision tools on the web for use by industry to help evaluate the relative merits of different catch share designs. 2.6 Work with fishing communities to develop community sustainability plans, and create fishing community trusts or permit banks. 2.7 Promote the wider use of the NMFS Fisheries Finance program for purchase of quota shares.
3. Informing and educating stakeholders
3.1 Implement a long term education and outreach strategy to help ensure the public is aware of NOAA's Catch Share Policy, informed of its progress, and engaged in its implementation. 3.2 Create a virtual information center/web portal to centralize catch share bibliographies, references, Frequently Asked Questions, referrals to regional expertise, case studies, news and information. 3.3 Conduct an 18-month schedule of regional workshops and webinars around the country including a focus on: 1) means to ensure sustainable communities and employment; 2) how to evaluate options for transferability and regulate excessive shares; and 3) design options for initial allocation of privileges. 3.4 Create an internal Catch Shares Center of Expertise as a coordination/consulting group. 3.5 Create a speakers bureau of fishermen willing to share their catch share experiences with other

fishermen and Councils.
4. Data, research and performance monitoring
4.1 Establish a nationwide electronic reporting goal for all fisheries regardless of their current status as a catch share program. 4.2 Provide scientifically-based advice and best practices guidance to establish observer programs for different catch share designs. 4.3 Create a catch shares market news service. 4.4 Conduct a catch share research program. 4.5 Establish relevant performance measures for monitoring progress.

GLOSSARY OF TERMS

Catch Share Program

Not defined in MSA. A catch share program is a generic term used to describe fishery management programs that allocate a specific percentage of the total allowable fishery catch or a specific fishing area to individuals, cooperatives, communities, or other entities. It includes more specific programs defined in statute such as Limited Access Privileges (LAP) and Individual Fishing Quotas (IFQ). It also includes Territorial Use Rights Fisheries (TURFs) that grant an exclusive privilege to fish in a geographically designated fishing ground. The recipient of a catch share is directly accountable to stop fishing when its specific share allocation is reached.

Dedicated Access Privilege (DAP)

Not defined in MSA. Defined in the U.S. Commission

on Ocean Policy Report as "...a novel form of output control whereby an individual fisherman, community, or other entity is granted the privilege to catch a specified percentage of the total allowable catch." Includes individual fishing quotas (IFQ), individual transferable quotas (ITQ), fishing community quotas, fishing cooperatives, and other geographically based programs that give an individual or group dedicated access to the fish within a specific area of the ocean.

Fishing Community

[MSA 16 USC 1802(17)] A community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community.

Fishing Cooperatives

Not defined in MSA; defined under the Fishermen's Collective Marketing Act (FCMA) of 1934 (15 USC 521). A group comprised of "persons engaged in the fishing industry as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, that may act together in association, corporate or otherwise."

Individual Fishing Quota (IFQ)

[MSA 16 USC 1802(23)] A Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be

received or held for exclusive use by a person.

Such term does not include community development quotas as described in section 305(i).

Individual Transferable Quota (ITQ)

Not defined in MSA. An individual fishing quota (IFQ) program where privileges can be transferred subsequent to initial allocations.

Limited Access Privilege

[MSA 16 USC 1801(26)] A Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person. This includes individual fishing quotas, but does not include community development quotas as described in section 305(i).

Limited Access System

[MSA 16 USC 1802 (27)] A system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.

Regional Fishery Association

[MSA 16 1802(14)] An association formed for the mutual benefit of members to meet social and economic needs in a region or sub-region; comprised of persons engaging in the harvest or processing of fishery

resources in that specific region or sub-region or who otherwise own or operate businesses substantially dependent upon a fishery.

Sector Allocation

Not defined in MSA. An exclusive assignment of some portion of the TAC to a group of two or more individuals holding permits in a fishery that have fulfilled Council eligibility and participation criteria, and have agreed to collaborate, voluntarily and for a specified period of time, in order to achieve a common set of objectives. The group may be organized around a particular gear type, species or geographic area with its purpose being the receipt of an exclusive privilege to fish.

Territorial Use Right Fishery

Not defined in the MSA. A single fisherman (or firm, organized group, community, etc.) having an exclusive privilege to fish in a geographically designated fishing ground.

[Note: Even though the term itself uses the word "right" the catch share programs in this policy are defined in terms of a granting of a privilege, not a property right.]

Footnotes

Committee to review individual fishing quotas, Ocean Studies Board, National Research Council, Washington, DC states that "IFQs can be used to address any number of social, economic and biologic issues in

fisheries management. Alternative management approaches can achieve some, but not all, of the objectives that can be achieved with IFQs....Although the IFQ is no panacea, it deserves a place in the array of techniques that may be needed in any particular fishery management plan."

1 Magnuson-Stevens Fishery Conservation and Management Act, codified at 16 U.S.C. 1801 et seq.

2 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479.

3 U.S. Commission on Ocean Policy, 2004. An ocean blueprint for the 21st Century. Final Report Recommendation 19-15 says in part "Every federal, interstate and state fishery management entity should consider the potential benefits of adopting such [dedicated access privilege] programs."

4 National Academy of Sciences, 1999. Sharing the fish: Toward a national policy on individual fishing quotas. Committee to review individual fishing quotas, Ocean Studies Board, National Research Council, Washington, DC states on p. 5 that "IFQs can be used to address any number of social, economic and biologic issues in fisheries management. Alternative management approaches can achieve some, but not all, of the objectives that can be achieved with IFQs ...Although the IFQ is no panacea, it deserves a place in the array of techniques that may be needed in any particular fishery management plan."

5 Sigler., M.F. and C.R. Lunsford, 2001. Effects of

individual quotas on catching efficiency and spawning potential in the Alaska sablefish fishery. Can. J. Fisheries and Aquatic Science 58: 1300-1312. Arnason, R. 2005. Property rights in fisheries: Iceland's experience with ITQs. Rev. Fish. Biol. Fisheries 15:(3) 243-264; Newell, R.G., J.N. Sanchirico and S. Kerr. 2005. Fishing Quota Markets, Journal of Environmental Economics and Management, vol. 49: 437-462.

6 Meridian Institute, 2009. Changing ocean, changing world: ocean priorities for the Obama administration and Congress. Joint Oceans Commission Initiative Report, Washington, DC.

7 Anderson, L.G. and M.C. Holliday (Eds.), 2007. Design and use of limited access privilege programs, NOAA Technical Memorandum F/SPO-86. Silver Spring, MD.

8 Whether specific criteria are useful to determine if catch shares are applicable to a fishery was considered in the 1999 National Academy of Sciences study to evaluate individual fishing quotas (IFQs). That study favored the approach that all fisheries that can be managed using a total allowable catch are potential candidates for IFQs. See National Academy of Sciences, 1999. Op.cit.

9 Redstone Strategy Group, 2007. Assessing the potential for LAPPs in U.S. fisheries. Report prepared for Environmental Defense, 41pp., Washington, DC.

10 Griffith, D.R., 2007. The ecological implications of individual fishing quotas and harvest cooperatives. Frontiers in Ecology and the Environment. 6(4): 191-

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